

United States
Circuit Court of Appeals
For the Ninth Circuit

OLGA SUNDIN, et al.,

Plaintiffs in Error,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

Filed

SEP 13 1917

F. D. Monckton,
Clerk.

No.....

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Names and Addresses of Attorneys of Record

Messrs. Plummer & Lavin,
Spokane, Washington.

Messrs. Black & Wernette,
Coeur d'Alene, Idaho.

Attorneys for Plaintiffs in Error.

Ralph S. Nelson, Esq.,
Coeur d'Alene, Idaho.

Attorney for Defendant in Error.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 672.

OLGA SUNDIN, and MARGUARETTE SUNDIN,
IVER SUNDIN, and EUGENE SUNDIN, mi-
nors, by Olga Sundin, their Guardian ad Litem,
Plaintiffs,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation,

Defendant.

COMPLAINT.

Come now the plaintiffs, and for cause of action
against the defendant, allege:

1.

That the above named plaintiffs are residents,
citizens and inhabitants of the State of Idaho, and
residents of and within the judicial district and divi-
sion of the above entitled court.

2.

That the above named defendant is a corporation,
created, organized, and existing under and by virtue
of the laws of the State of Washington, and a citizen
of the State of Washington.

3.

That plaintiffs, Marguarette Sundin, Iver Sundin,
and Eugene Sundin are the minor children of Axel
Sundin, deceased, and Olga Sundin, one of the plain-
tiffs herein, and said plaintiff Olga Sundin is the duly

appointed and acting guardian ad litem of the said minor children, and brings this action on her own behalf, and on behalf of the said minor children.

4.

That at all times herein mentioned, the defendant owned, operated, and controlled a certain lumber manufacturing plant in Kootenai County, in the State of Idaho, and was engaged in the manufacturing of lumber and lumber materials, and had adjacent thereto and in connection with said lumber manufacturing plant, yards, lumber cars, tracks, platforms, and other equipment which was used by the defendant in carrying on its manufacturing business, and in transporting said lumber and lumber products.

5.

That on to-wit, the 15th day of May, 1916, Axel Sundin was in the employ of defendant, and was working in and about its lumber yards, above mentioned.

6.

That said Axel Sundin, was at the time of his death and injury hereinafter mentioned, the husband of plaintiff, Olga Sundin, and the father of the said minor children.

7.

That a part of the equipment, appliances, and structures in and about the yards wherein said Axel Sundin was working, at the time of his injury and death, hereinafter mentioned, there were certain runways, platforms, and endless chain rollers, extending

out from the saw mill of defendant at right angles therewith, and when the lumber was taken from said sawmill, it was transported out on the said endless chain roller appliances, to the end of said extended structure or platform, wherefrom it was taken by employees of the defendant, and placed upon small lumber cars, which cars were situated at right angles with the outer end of said platform or structure.

8.

That there was constructed and used by defendant, certain narrow railway tracks, extending from said endless chain roller platform structure in a southerly direction, to another track running at right angles with said last mentioned short tracks, and on said last mentioned tracks said Company provided and used what is known as "transfer cars" for the purpose of transporting the lumber down to another part of the company's yards for transportation away from said lumber plant. That the manner and method of carrying on such work was as follows:

Said lumber would be carried out to the end of said endless chain roller platform and structure, and taken therefrom by workmen in the employ of defendant and piled upon small lumber cars on the said tracks, which cars were standing at right angles with said endless chain roller structure and platform, and when said small lumber cars were loaded with lumber, they would be pushed along said short tracks by other men in the employ of defendant, and pushed over and upon a transfer car, which was set opposite said short track on a transfer track at right angles

with said short tracks, and it was necessary to move said small cars of lumber, loaded as aforesaid, along said short tracks and upon said transfer cars. The car and lumber were placed upon said transfer car.

9.

That the surface of the transfer car was about one inch higher than the surface of the track over which said small lumber cars were transported, and in order to get said car of lumber, including the car, upon said transfer car, it was necessary and customary for the men pushing said small car of lumber to give it an extremely hard and violent push, so that the same would be placed upon the rails of said transfer car by its own momentum, and would thereby be placed upon the surface of the said transfer car.

10.

That on to-wit, the 15th day of May, 1916, the deceased, Axel Sundin, was in the employ of defendant, as aforesaid, in another part of the yards of said company, and after one of the said small cars of lumber has been loaded with lumber, said Axel Sundin was called from his duties in another part of said yards and directed, by the foreman, who was in charge of said work, Ed Moe, to go to said loaded car and assist the other men, who had been directed to move said car, in pushing said car along said track, up to and upon the said transfer track and transfer car above referred to, and in pursuance of his duties, said Axel Sundin, obeyed the orders that said foreman, Ed Moe, and left his work in another

part of the said yards and went to the southern part of said yards and joined the other workmen of the defendant, according to the orders and instructions of said foreman, in moving and pushing said load of lumber along said short tracks.

11.

That three of the men who were engaged in shoving and pushing said car, were walking at the rear of said car while pushing the same, and it was therefore impossible for said deceased Sundin to assist in moving said car, excepting by walking along the side of the said car, and by taking hold of the side of said car, and in that manner push the car along said tracks, which he was doing at the time of his injury and death hereinafter referred to, to the utmost of his ability, and it was his duty to perform said work in the manner in which he was performing it. That when said car had been moved to the said transfer car, and in order to force said load of lumber car upon said transfer car, it was necessary, on account of the fact that the surface of said transfer car was one inch higher than the surface of the rails upon which said lumber car was standing, for all of the men who were engaged in moving said car, including the said Axel Sundin, to give said loaded car an extraordinarily violent push and shove, and while all the said men, including the said Axel Sundin, were doing so, a part of said lumber on the said car collapsed, and fell over and upon the person of said Axel Sundin, causing him injuries, from which he afterwards on to-wit, June 14th, 1916, died.

12.

That the pile of lumber on said car consisted of boards which were 1 inch x 6 inches x 16 feet, and were green, white pine, and very rough lumber. They were piled six tiers in width, and fifty-five courses high. All of said lumber was very heavy. That the usual load placed upon said cars was from forty-five to fifty courses high, and the load which collapsed and caused the death of said Axel Sundin was larger, higher and heavier than it was customary to place on said lumber cars.

13.

That the falling over and collapsing of said lumber pile from the said car, was due wholly and exclusively to the carelessness and negligence of defendant, its agents, and servants, in the manner of which said lumber was loaded upon said car, in this to-wit: that it was customary, usual and necessary in order to make said load of lumber safe from falling over, that there should be inserted between every few courses, and laid crosswise of said car, cross pieces, so as to bind and hold said upright tiers of lumber, in order to prevent said lumber pile from falling over and collapsing and said lumber pile would in that manner be held stationary and could then be moved in safety in the manner in which it was necessary to be moved, and in which manner it was being moved, at the time of the said collapsing, in order to accomplish the results which said Axel Sundin and his associates were required to accomplish.

14.

That defendant failed and neglected to place any cross pieces on said load so as to keep the same from falling off, or secure said load in any manner, and that if said binders or cross pieces had been put on said load, the said load and lumber thereon could not and would not have fallen over and upon said Axel Sundin, causing his injury and death, hereinbefore mentioned.

15.

That said Axel Sundin had nothing to do with the loading of said car, or the handling of the same, excepting as hereinbefore mentioned; that he relied upon the performance by the defendant of its duty to load the said car so that it could be safely pushed over and upon said transfer car, and without danger of falling off or collapsing. That he was performing the acts hereinbefore mentioned in assisting in pushing said car along said tracks, under the direct command of the foreman of said company, Ed Moe, and in so doing could not and did not anticipate or appreciate any danger in doing those acts which he was doing, and which it was his duty to do, at the time of the happening of the accident, hereinbefore referred to.

16.

That the service of the transfer car upon which it was the duty of said Axel Sundin and his associates to place said car of lumber, was constructed, used, and maintained in a defective and unsafe manner, in this, to wit: that the track upon which said

transfer car was standing was of such a heighth as to bring the level of the transfer car to a point one inch higher than the level of the track upon which said car of lumber was necessarily transported over, the said difference in height being due to the irregularity of the ground, over which the said transfer car track and lumber car track were built and maintained and which could have been easily remedied and obviated in the exercise by the defendant of reasonable care. That the condition of the said transfer car track was due wholly to the carelessness and negligence of defendant, as aforesaid, and that said condition was one of the contributing causes of the injury of and death of the said Axel Sundin, in this, to-wit: that had said track upon which said car of lumber was being transported been maintained on a level with the surface of the transfer car, upon which said car of lumber had to be rolled or placed, no extradordinary or violent pushing of said car of lumber would have been necessary, and would have obviated the shock to said car of lumber, which added and contributed to the collapsing of said car of lumber, and falling down of the tiers thereof, as aforesaid.

17.

That while said Axel Sundin knew of the difference in heighth of said track with the said transfer car, and the necessity for violent and extraordinary movement of said car, in order to overcome the obstruction, caused by the difference in height, he complained to the said foreman, Ed Moe, of the con-

dition of said track and transfer car, and the necessity for the violent shoving of said car of lumber upon said transfer car, which complaint was made to said Moe, immediately upon being ordered to go around and assist in the movement of said car of lumber, and said Moe as foreman, promised said Sundin that the same would be repaired in a few days, and then and there ordered him to go on and assist in moving said car, regardless of condition of said track, which order was preemptorily given and said Sundin, knowing and appreciating that it meant his discharge from the service of the defendant if he did not obey, and relying on the promise of said foreman, proceeded with the performance of his duties as instructed by said foreman, Moe, and did perform the duties required of him, as hereinbefore mentioned.

18.

That at no time did said Axel Sundin know of the failure of defendant to place, at certain intervals, cross pieces at right angles on said load of lumber so as to bind the same, and thereby prevent the same from tumbling off or collapsing, and could not have been so informed in the exercise of reasonable care by him.

19.

That by reasons of the facts herein pleaded, the carelessness, and negligence on the part of the defendant in causing the injury and death of said Axel Sundin, plaintiffs are and have been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), no part of which has been paid.

Wherefore, Plaintiffs demand judgment against defendants for Fifty Thousand Dollars (\$50,000.00) and for their costs and disbursements herein.

PLUMMER & LAVIN,
Attorneys for Plaintiffs,
residing at Spokane, Wash.
BLACK & WERNETTE,
Attorneys for Plaintiffs,
residing at Coeur d'Alene, Ida.

State of Idaho,
County of Kootenai,—ss.

Olga Sundin, being first duly sworn, deposes and on oath says: that she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint, knows the contents thereof, and that the same is true, as she verily believes.

OLGA SUNDIN.

Subscribed and sworn to before me this 19th day of December, 1916.

EDWARD H. BERG,
Notary Public in and for the State
of Idaho, residing at Coeur d'Alene,
(N. P. Seal) Idaho.

Endorsed: Filed Dec. 20, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

ANSWER.

Comes now the above named defendant, and for answer to plaintiffs' complaint says:

I-VIII.

In answering paragraphs one to eight inclusive, defendant admits the allegations of one, two, three, four, five, six, seven and eight.

IX.

Answering paragraph nine defendant denies that the surface of the transfer car was about one inch higher or any amount higher than the surface of the track over which said small cars were transported, and denies that in order to get said car of lumber including the car, upon said transfer car, it was necessary or customary for the men pushing said small car of lumber to give it an extraordinarily hard or violent push, so that the same would be placed upon the rails of said transfer car by its own momentum, and would thereby be placed upon the surface of said transfer car.

X.

Defendant admits that on the 15th day of May, 1916, Axel Sundin was in the employ of defendant, but denies that at said time he was employed in another part of the yards of said company, and denies that after one of said small cars of lumber had been loaded with lumber, said Axel Sundin was called from his duties in another part of said yard and directed by the foreman who was in charge of said work, Ed Moe, or by any other party, to go to said

loaded car and assist the other men who had been directed to move said car, in pushing said car along said track up to and upon the said transfer track or said transfer car above referred to, and denies that in pursuance of his duties said Axel Sundin obeyed the orders of said foreman Ed Moe, and denies that the said Axel Sundin left his work in another part of said yards and went to the southern part of the said yards and joined the other workmen of defendant according to the orders or instructions of said foreman or any other person, in moving and pushing said load of lumber along said short tracks.

XI.

Answering paragraph eleven, defendant denies that three of the men who were engaged in shoving and pushing said car were walking at the rear of said car, while pushing the same, and denies that it was impossible for said deceased, Sundin, to assist in moving said car except by walking along the side of said car, and denies that it was impossible for said deceased, Sundin, to assist in moving said car except by taking hold of the side of said car, and in that manner push the car along said tracks, which he was doing at the time of his injury and death; and defendant denies that it was the duty of said deceased to perform said work in the manner in which he was performing it, or that he was doing said work to the utmost of his ability. Defendant denies that when said car had been moved to said transfer car, and in order to force said car of lumber upon said transfer car, it was necessary on account of

the fact that the surface of the said transfer car was one inch higher or any higher than the surface of the rails upon which said car of lumber was standing, for all or any of the men who were engaged in moving said car, including the said Axel Sundin, to give said car an extraordinarily violent push or shove, and defendant denies that while all of said men, including said Axel Sundin, were doing so, a part of said lumber on said car collapsed and fell over and upon the person of said Axel Sundin, causing him injuries from which he afterwards, on to-wit: June 14th, 1916, died; defendant admits that on May 15th, 1916, while Axel Sundin was walking along the side of a truck of lumber, a part of said lumber fell over and upon the person of said Axel Sundin, causing him injuries from which he afterwards, on to-wit: June 14th, 1916, died.

XII.

Answering paragraph 12 defendant admits that the pile of lumber on said car consisted of boards which were about 1 inch x 6 inches x 16 feet, and that they were green, white pine, and rough lumber; defendant admits that they were piled six tiers in width; but denies that they were piled fifty-five courses high; defendant admits that said lumber was very heavy; defendant denies that the usual load placed upon said cars was from forty-five to fifty courses high, but in reference thereto specifically alleges that the loads varied according to the kind, size and dimensions of the timber, or the supply at hand and the load desired, and alleges that many of

the loads were from forty-five to fifty courses high; defendant denies that the load which collapsed and caused the death of Axel Sundin was largely higher than usual, or heavier than it was customary to place on said lumber cars.

XIII.

Answering paragraph thirteen defendant denies that the falling over or collapsing of said lumber pile from said car was due wholly or exclusively or at all to the carelessness or negligence of the defendant or its agents or servants in the manner in which said lumber was loaded upon said car or in any other particular or in any manner. Defendant denies that it was customary or usual or necessary in order to make said load of lumber safe from falling over that there should be inserted or laid between every few courses or in any manner at all, cross pieces crosswise of said car, so as to bind or hold said upright tiers of lumber or in order to prevent said lumber pile from falling over or collapsing. Defendant denies that said lumber pile would in that manner be held stationary or could then be moved in safety in the manner in which it was necessary to be moved and in which manner it was being moved at the time of said collapsing, in order to accomplish the results which said Axel Sundin and his associates were required to accomplish.

XIV.

Answering paragraph fourteen, defendant denies that it failed and neglected to place any cross pieces on said load, so as to keep the same from falling off,

or to secure said load in any manner, and denies that if said binders or cross pieces had been put on said load, the said load of lumber thereon could not and would not have fallen over and upon said Axel Sundin, causing his injuries and death.

XV.

Answering paragraph fifteen, defendant denies that said Axel Sundin had nothing to do with the loading of said car or handling of the same, except as mentioned in plaintiffs' complaint, and denies that Axel Sundin relied upon the performance by the defendant of its duty to load the said car so that it could be safely pushed over and upon said transfer car, or without danger of falling off or collapsing, and denies that he was performing the acts mentioned in said complaint, in assisting and pushing said car along said tracks, under the direct commands of Ed Moe, foreman of said company, or anyone else, and denies that in so doing the said deceased could not or did not anticipate or appreciate any danger in doing those acts which he was doing or which it was his duty to do, at the time of the happening of the accident.

XVI.

Answering paragraph sixteen, defendant denies that the surface of the transfer car, upon which it was the duty of said Axel Sundin or his associates to place said car of lumber, was constructed, used or maintained in a defective or unsafe manner, and denies that the track upon which said transfer car was standing was of such a height as to bring the

level of the transfer car to a point one inch higher than the level of the track upon which said car of lumber was necessarily transported over, and denies that there was any difference in the height of said tracks or that the difference in height was due to the irregularity of the ground over which the said transfer car track and lumber car track were built or maintained, or which could have been easily remedied and obviated in the exercise by the defendant of reasonable care; defendant denies that the condition of said transfer car track was due wholly or at all to the carelessness or negligence of the defendant, and denies that said condition was one of the contributing causes of the injury of and death to said Axel Sundin, and denies that if said track upon which said car of lumber was being transported, had been maintained on a level with the surface of the transfer car upon which said car of lumber had to be rolled or placed, no extraordinary or violent pushing of said car of lumber would have been necessary, or would have obviated the shock to said car of lumber, which added or contributed to the collapsing of said car of lumber or falling down of the tiers thereof.

XVII.

Defendant admits that if there was any difference in the height of the platform tracks and the height of the tracks of the transfer car, that said Axel Sundin knew of the said difference, and admits that the said Axel Sundin knew of the necessity for violent and extraordinary move-

ment of said car in order to overcome the obstruction caused by the difference in height; but denies that he complained to said Ed Moe, foreman, or to any other servant or employe of the defendant, of the condition of said track or transfer car, or of the necessity for the violent shoving of said car of lumber upon said transfer car, and denies that said complaint was made to said Ed. Moe, or to any other agent, servant or employe of the defendant, immediately upon being ordered to go around and assist in the movement of said car of lumber, or at any other time, and denies that the said Ed Moe, as foreman, or any other agent, servant or employe of defendant promised said Sundin that the same would be repaired in a few days or at all, and denies that said Ed Moe or any other agent, servant or employe of said defendant company then ordered said Sundin to go on or assist in the moving of said car, regardless of the condition of said track, and denies that any such order was peremptorily given, and denies that said Sundin knew that it meant his discharge from the service of the defendant company if he did not obey, and denies that said Sundin relied upon any promise of said foreman, while proceeding with the performance of his duties, as instructed by said foreman Moe, or did perform the duties required of him.

XVIII.

Answering paragraph 18 of said complaint, defendant denies that at no time did said Axel Sundin know of the failure of said defendant to place at certain

intervals, cross pieces at right angles of said load of lumber, so as to bind the same and thereby prevent the same from falling or collapsing and denies that the said Sundin could not have been so informed in the exercise of reasonable care by him.

XIX.

Answering paragraph nineteen, defendant denies that by reason of the facts set forth in plaintiffs' complaint, that the carelessness or negligence on the part of the defendant in causing the injury or death of said Axel Sundin, plaintiffs are or have been damaged in the sum of fifty thousand dollars (\$50,000.00) or in any sum whatever, but defendant admits that no part of said fifty thousand dollars (\$50,000.00) has been paid.

For defendant's first, further and affirmative defense and answer to plaintiffs' complaint herein, defendant states and alleges:

I.

That at the time said plaintiff met with said accident, he was a man of mature age and discretion and was thoroughly familiar with the location, manner of construction and manner of operation of the cars, trucks, tracks, platforms, piles of lumber, and all other machinery and equipment used in and around said platform and place of work occupied by said deceased at the time of the accident, and that he was entirely familiar with the manner of piling the lumber on said trucks and with the man-

ner of moving the same, and of the manner of placing the same upon said transfer cars and of taking the same over the transfer cars and entirely familiar with all of the methods of operation of said work in said lumber yards and was thoroughly familiar with all the dangers and risks in and around said piles of lumber, trucks, cars, and equipment and with the moving of said cars or trucks of lumber, and was thoroughly familiar with the danger of said piles of lumber falling from said cars or trucks and with all the dangers and risks of the work incident to the work he was engaged in at the time of the accident, and voluntarily accepted said employment and asked for said employment and remained in said employment and performed said work voluntarily, chargeable with knowledge of all the dangers and risks concerning the same, and assumed the risk of the injuries in the manner in which they were sustained.

For its second, further and affirmative defense this defendant alleges:

II.

That each and all of the injuries received by the deceased Axel Sundin and from which he died, and for which complaint is made in this action, were received as a result of the negligence and carelessness of himself approximately contributing thereto, and were not the result of any act for which the defendant is liable.

For a third further and affirmative defense this defendant alleges:

III.

That if any of the injuries received by the said Axel Sundin from which he died, were received as a result of the negligence of any other person than his own negligence, the same were due to the negligence of the fellow servants of the deceased, Axel Sundin, and for which this defendant is in no way responsible.

Wherefore, Your defendant prays that plaintiff take nothing by said action and that defendant recover its costs herein expended.

R. S. NELSON,

Attorney for Defendant.

Coeur d'Alene, Idaho.

State of Idaho,

County of Kootenai,—ss.

Huntington Taylor, being first duly sworn on oath, deposes and says:

That he is the general manager of the defendant, Edward Rutledge Timber Company, a corporation, and makes this affidavit on its behalf, that he has read the above answer, knows the contents thereof and believes the allegations therein contained to be true.

HUNTINGTON TAYLOR.

Subscribed and sworn to before me this 22nd day of March, 1917.

F. A. O'ROURKE,

Notary Public for the State of Idaho,

(N. P. Seal)

residing at Coeur d'Alene.

Service acknowledged.

Endorsed: Filed April 4, 1917.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 672.

JUDGMENT.

This action came regularly on for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined and after the evidence had been closed, on motion of counsel for the defendant, the court instructed the jury to return a verdict for the defendant, and thereupon the following verdict was rendered: "We, the jury in the above entitled cause, upon instructions of the court, find for the defendant."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is *Ordered and Adjudged* that the said defendant have and recover from the plaintiffs its costs and disbursements incurred in this action amounting to the sum of \$80.60.

Dated this 4th day of June, 1917.

W. D. McREYNOLDS,

Filed June 4th, 1917.

Clerk.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 672.

BILL OF EXCEPTIONS.

*To the Clerk of the above entitled court, and to
Ralph S. Nelson, Esquire, Attorney for defend-
ant:*

You, and each of you are hereby notified that the plaintiff in the above entitled cause hereby submits

and delivers to the Clerk of the above entitled court, plaintiffs' proposed Bill of Exceptions in the above entitled cause.

Dated at Spokane, Washington, this 28th day of June, A. D. 1917.

PLUMMER & LAVIN,
BLACK & WERNETTE,
Attorneys for Plaintiffs.

Service of a true copy of plaintiffs Proposed Bill of Exceptions, acknowledged this 29th day of June, A. D. 1917.

RALPH S. NELSON,
Attorney for Defendant.

This cause came on to be heard at Coeur d'Alene, Idaho, on Saturday, June 2nd, 1917, before Honorable Frank S. Dietrich, Judge of the above entitled court, and a jury, and the following proceedings were had, to-wit:

ANDREW MOE, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Andrew Moe.

Q. Where do you reside, Mr. Moe?

A. 703 Government Way, Coeur d'Alene.

Q. Were you ever connected with the Edward Rutledge Lumber Company in this city?

A. Yes.

Q. In what capacity were you connected with that company, if at all, on the 15th of May, 1916?

A. Yard foreman.

Q. As yard foreman, what gangs of men did you have charge of?

A. The lumber pilers and chain and transfer men.

Q. Chain gang?

A. Yes.

Q. State whether or not Mr. Sundin, during his lifetime, at the time of his death, or the injury that caused his death, if he was under you?

A. Yes, sir.

Q. What gang did he belong to?

A. The transfer gang.

Q. Now the men that take the lumber after it comes from the mill,—it comes out on an endless chain, doesn't it?

A. Yes.

Q. And when that comes out from the mill, the men who take that lumber, what is that gang of men called?

A. We generally call them chain men.

Q. And the men who move the cars after they are loaded by the chain men, out to this other track, out to the end of the short tracks, what is that gang called?

A. That is the transfer gang.

Q. Had the transfer gang anything to do with the chain gang?

A. No, not particularly, no.

Q. In other words, the transfer gang does not have anything to do with loading the cars at all, does it?

A. No.

Q. What do the transfer gang do with reference to this loaded lumber, after the chain gang have loaded the cars?

A. Shove it out and put it on the transfer track and run it out in the yards.

Q. And I believe you said Mr. Sundin was a member of the transfer gang?

A. Yes, sir.

Q. How long had he been a member of that gang in that yard under you, Mr. Moe.

A. Ever since the mill started, the 3rd day of April, I guess, Monday morning, it started.

Q. The April preceding the time he was killed, you mean?

A. Yes.

Q. State whether or not you had charge of this chain gang and the transfer gang, as to their duties and their work?

A. Yes, sir.

Q. How many tracks were there paralleling or running at right angles with this endless chain arrangement you spoke of?

A. I think there was seventy on one side, and I think there was sixty-eight on one side, I believe; I aint sure, but I think about that.

Q. About seventy on the side Mr. Sundin was working on?

A. No. He worked on the short side; that was sixty-eight, I think.

Q. How long were those tracks?

A. Oh, on the south side they were probably twenty-five or thirty feet.

Q. How long on this side this car was on?

A. That is the side I mean, the south side.

Q. You say about twenty-five or thirty feet?

A. Something like that probably.

Q. Anyhow, they were short tracks?

A. Yes, short tracks.

Q. When the transfer gang would move these cars of lumber over to the end of those short tracks, what was necessary in order to get the cars up on that transfer car?

A. Shove it up.

Q. Was there a track on the transfer car?

A. Sure.

Q. State what the fact is with reference to the whole car, lumber and all, being shoved on to the transfer car?

A. Certainly.

Q. What was the custom there during the time you worked there as foreman and the time Mr. Sundin worked there, with reference to the men who loaded the cars, the chain gang, putting cross pieces or what you call binders at different intervals between these boards on this car for the purpose of holding it together?

A. That was the orders to all the men on the chain.

Q. It was the custom to do that in that yard, was it?

A. Yes.

Q. Had you yourself moved the cars there, these cars that I have described, these short cars?

A. Yes, sir, lots of them.

Q. And when those cars were moved, when there was a heavy load, for instance, and there was three men on the end shoving, where was it customary and usual for the other man who had to help to have hold of the car?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, no custom having been alleged in the pleading, and they can't base any negligence upon it.

MR. PLUMMER: We are not basing any negligence on the fact that he was in the wrong place.

THE COURT: He may answer. The objection is overruled.

MR. NELSON: An exception.

A. Any place that he could get hold of it.

MR. PLUMMER: Q. State what the fact was before Mr. Sundin's death, if it was frequently the custom for men to get hold of the car like that (illustrating), with his back to it?

A. It was sometimes.

Q. And did you do that yourself sometimes?

A. Yes.

MR. NELSON: I object to the leading of the witness.

THE COURT: Yes, it is leading.

MR. PLUMMER: I will change the form of the question. He has answered already.

THE COURT: He has answered this. You needn't go over it again, but avoid leading questions.

MR. PLUMMER: Yes, I will, if your Honor please.

Q. What is the fact, Mr. Moe, at the time that Mr. Sundin was killed, or just before he was killed, when they were moving those cars out, whether or not the work was being rushed at that time by the men under your instructions or directions?

A. Oh, not any more than generally. We always had all we could do.

Q. Was it generally the custom to rush it?

MR. NELSON: We object to that as incompetent and immaterial.

THE COURT: What do you mean by rush?

MR. PLUMMER: Crowd and hurry the work along.

THE COURT: You mean unreasonably?

MR. PLUMMER: No, I don't know what would be a reasonable—

THE COURT: You don't allege any failure on the part of the defendant in that respect, do you?

MR. PLUMMER: No.

THE COURT: The objection is sustained.

MR. PLUMMER: I would like to put it in different form then, if the form is objectional.

Q. Were or were not the men required to work rapidly in the performance of their duties there in taking these cars out?

MR. PLUMMER: The purpose of that is to show why, even if it were possible for Sundin to have seen the absence of these strips, it is a circumstance indicating that he wouldn't probably observe them if he was rushing along with the work and had to hurry through the work, as distinguished from his taking his own time.

THE COURT: In the absence of some other showing it will be presumed that they worked with reasonable agility.

MR. PLUMMER: Q. About how many strips, that is, take a load now composed of six tiers, of one by six, sixteen feet long, that kind of lumber, there would be about six tiers, wouldn't there, on a car?

A. Yes, six tiers.

Q. And about how high?

A. Oh, sometimes forty-five and sometimes fifty.

Q. Fifty boards, you mean?

A. Yes, high, I mean.

Q. Fifty boards high?

A. Yes, sometimes more than that.

Q. That would be forty or fifty inch board from the floor of the car?

A. Yes, sir.

Q. About how many strips do you usually put through cross-ways between the boards as binders to hold them on?

MR. NELSON: We object to that as immaterial. They allege that in this load there were no strips. They have alleged that it was the custom to put in strips and the number, I think, is wholly immaterial

and in the load they complain of they allege that there were no strips.

THE COURT: He may answer.

MR. PLUMMER: Q. About how many?

A. That depended a good deal on the kind of lumber it was.

Q. The kind of lumber I have just described to you, wet, green lumber?

A. Two and three and four sometimes.

Q. What were they put through there for?

A. Put there to hold the load together, of course.

Q. I believe you stated that they were laid cross-ways from the way the lumber itself was laid?

A. Yes.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. Who employed Mr. Sundin, Mr. Moe?

A. I did.

Q. When you employed him where did he first work?

A. He worked out in the yard, helped building the track.

Q. And you say he went to work on the transfer platform on April 3, 1916?

A. Yes, sir. That was on Monday, wasn't it?

Q. Yes, on Monday, April 3rd?

A. That's right.

Q. Mr. Moe, what statement as to experience did Mr. Sundin make when you employed him? What experience did he say he had had as to similar work?

MR. PLUMMER: I object to that as not cross examination. That is a matter of defense, assumption of risk, and couldn't be for any other purpose.

THE COURT: That would seem to be true, would it not, Mr. Nelson? Is this germane to any other matter to which he testified?

MR. NELSON: He testified that he was his foreman, and that he put him to work there and had charge of him. Now as to whether or not he would put an inexperienced man there or not, or what experience this man had had—

THE COURT: It isn't claimed yet that he was an inexperienced man. There is no evidence of that. The objection is sustained.

MR. NELSON: We except.

Q. You saw Mr. Sundin working around there from the time you employed him up until the time he was injured, did you, Mr. Moe?

A. Yes.

Q. Daily?

A. Every day.

Q. State whether or not you could tell from observing him whether or not he was an experienced man.

MR. PLUMMER: We object to that as not cross examination, and no issue upon that point.

THE COURT: Sustained.

MR. NELSON: We except, if Your Honor please.

THE COURT: It will be understood that counsel have exceptions to all adverse rulings.

MR. NELSON: Q. This was Monday morning, I believe, when this accident happened?

A. Yes, Monday, between nine and ten, I should judge.

Q. Between nine and ten?

A. Yes.

Q. And the week before Mr. Sundin had been on the night shift, had he not?

A. I think so.

Q. And he went to work that morning at what time?

A. At seven o'clock.

Q. And did you work with him that morning?

A. Yes, I helped him some.

Q. Who else worked with you and Mr. Sundin in moving these cars of lumber?

A. Harry Brewsted and Sam Knudson.

Q. What time did you say he went to work that morning?

A. Seven o'clock.

Q. What work did you do when you went to work at seven o'clock?

A. Taking out loads.

Q. This load that fell then wasn't the first load that was taken out that morning, was it?

A. No.

MR. PLUMMER: I didn't say it was,—on that track.

MR. NELSON: I misunderstood you then.

Q. Then you had taken out a good many loads that morning?

A. Yes, sir.

Q. Did you help move this load that fell?

A. No, sir.

Q. Now in regard to these cross-pieces,—the men working up on the chain shed put in the cross-pieces on the load, did they not?

A. Yes, sir.

Q. And where were these cross-pieces kept, so that they could get them and put them in these loads?

A. They were kept overhead, different places, where they would be handy to get them.

Q. Convenient to where they worked?

A. Convenient to where they worked.

Q. There was a supply kept on hand all of the time, and whenever they wanted one or thought one ought to go in the load they could get it and put it in the load?

A. Nearly all the time they were there.

Q. How much experience, Mr. Moe, have you had in handling trucks of lumber similar to this one that fell?

A. About twenty-four or twenty-five years.

Q. About how much of the lumber fell from off that load, Mr. Moe?

A. I didn't count them, but it must have been something about a hundred pieces, or a little more probably.

Q. And it fell from one corner of the load, did it?

A. I couldn't tell, because when we got there the load was all torn to pieces, and I couldn't tell where it come from.

Q. Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side

of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any cross pieces in the load?

MR. PLUMMER: We object to that as not cross examination, and it is a part of their defense, if Your Honor please.

THE COURT: Overruled.

MR. NELSON: Answer the question.

A. I don't know whether anybody else could tell, but I could generally tell by a glance of the eye.

Q. Could the ordinary man who had had experience in loading lumber and shoving these trucks for a month or six weeks or longer tell by a casual examination of it from the side of it as to whether or not there were cross pieces in that load?

MR. PLUMMER: If Your Honor please, I think that is objectionable for two or three different reasons. One is that it calls for a conclusion, and the next is that it seems to me that is one of the questions this jury can decide, and it is not the subject of expert testimony. It seems to me we should let the jury say whether or not under all the circumstances he should have seen it.

THE COURT: This isn't a question of what ought to have been done; it is a question of what could have been done.

MR. PLUMMER: Wouldn't that be his conclusion? It seems to me he could say how they were and let the jury say whether or not he could see them.

THE COURT: I think this is a more direct way

of getting at it. I think it is a case where he can state his conclusion.

MR. NELSON: Read the question to the witness.

(Last question read.)

A. He could if he thought of it and looked for them.

Q. If he had thought of it and looked by a casual glance at the load he could have told?

A. Yes, sir.

Q. Mr. Moe, you say you have had some twenty or twenty-five years of experience in handling trucks of lumber similar to this?

A. Yes, something like that.

Q. I will ask you, Mr. Moe, whether or not in your opinion you would consider it reasonably prudent for a man experienced in the handling of trucks of lumber similar to this to go alongside of a truck of lumber fifty tiers high, of six-inch white pine, one by six, sixteen feet long, fifty or more tiers high, without any cross pieces in it, and use his back, put his back up against that load of lumber and try to move it?

MR. PLUMMER: We object to that, if Your Honor please, on the ground that it isn't cross examination and calls for a conclusion.

THE COURT: Sustained.

MR. NELSON: May I ask the court if it is on the ground that it isn't cross examination?

THE COURT: Yes.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, you were asked about the ability of a man to see whether or not there were cross pieces in between these boards, and you answered, if he looked for them. Now what is the fact with reference to before those cars are moved out? The car that is moved out is in between other cars loaded with lumber?

A. Yes, sir.

Q. And how much space is there between the lumber on one car and the lumber on the other?

A. There aint much.

Q. About six inches, isn't it?

A. Well, sometimes—

THE COURT: Don't lead him, Mr. Plummer.

MR. PLUMMER: Q. How far is it?

A. Sometimes six inches, sometimes more, and sometimes less; I can't tell,—according to how wide they build the load.

THE COURT: Well, if the cars are so close together as that, how does a man get to the side of the car to push it?

A. They aint supposed to go alongside of it. They are supposed to go behind it and shove it up.

Q. If there were three men shoving from behind, and another man goes along the side, as you have described, could he get hold of the side until the car—

THE COURT: Mr. Plummer, you will have to refrain from these leading questions, or I will not permit you to examine at all.

MR. PLUMMER: I will. I beg the court's pardon.

Q. When does this man that takes hold of the side, when does he take hold of it?

A. I don't know.

Q. When do they ordinarily take hold of it, when they catch hold of the side as you have described they did, when does he take hold of it?

MR. NELSON: If Your Honor please, I object to that.

THE COURT: The objection is sustained.

MR. PLUMMER: I understood the court to ask him how he could get hold of it, and he said he was supposed to get behind.

THE COURT: Yes. Now you are assuming that ordinarily they get hold of the side.

MR. PLUMMER: Well, he said they did.

THE COURT: No. He answered a sort of a general complex question in which that was involved possibly, but you exhibited to him how you thought perhaps it was done. But you may ask him, if you want to, the direct question as to whether that is customary.

MR. PLUMMER: Yes.

Q. Mr. Moe, assuming that there are three men behind shoving, and no room for any more, where does the fourth man, if he does help shove the car out, take hold of the car ordinarily, according to the custom in vogue.

THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?

A. It is customary part of the time.

MR. PLUMMER: Q. When they get hold of the side when do they take hold?

MR. NELSON: If Your Honor please, I object to that unless he puts his question, assuming that the witness took the position he says this man took on the side of the load, with his back to the load. It isn't a fair question otherwise.

MR. PLUMMER: I can't prove my case by one witness. He wasn't there.

MR. NELSON: He has already alleged in his opening statement, and the proof shows, that this man put his back to that load when he took hold of the car, and I think it is immaterial as to what other men might do in that case.

THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?

A. They do sometimes.

THE COURT: They do sometimes?

A. Yes.

THE COURT: You may proceed.

MR. PLUMMER: Q. Now again, when the man takes hold as the court has referred to in his question, with his back to it, when does he take hold of the car?

THE COURT: In that way. Where is the car, in what position is it when he takes hold in that way?

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads.

MR. PLUMMER: That is what I understood.

Q. You were asked the question,—I don't know whether it was made clear or not by counsel's subsequent questions,—as to whether or not you helped Sundin that morning. Did you help him move any lumber that morning?

A. Yes, sir.

Q. On this track?

A. No, not on that track.

Q. Do you know whether or not that was the first or second or third load that was moved on that track that morning?

A. I think it was the first.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. Mr. Moe, do you know whether or not is is customary for a man to place his back up against a load fifty tiers high, in which there were no cross pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman.

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Therefore it wouldn't be proper cross examination.

THE COURT: No, it isn't shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He also stated that they weren't supposed to do it.

MR. NELSON: We will withdraw the question, if Your Honor please. That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, assuming that there were three men shoving the car out from between the other cars, and no more room on the end of the car so that men could get there to shove, and Mr. Sundin was called to help move the car out, and those other three men were already stationed at the end, where was it Mr. Sundin's duty to take hold of the car?

MR. NELSON: If Your Honor please, we object to that as assuming facts not proven, and not in accordance with the allegations in this case, and one of the questions for the jury to decide, as to whether or not there is room on the rear of the car for four men to shove.

THE COURT: Objection sustained.

MR. PLUMMER: Does the court hold that we can't show that it was his duty?

THE COURT: You can't show it now anyway. It may be that the facts will develop so as to make the proof proper later.

MR. PLUMMER: That is all then, Your Honor.

MR. NELSON: That is all the cross examination I have at this time, in view of the statement in the pleadings and the statement of counsel.

THE COURT: I want to ask you a question, Mr. Moe. You have stated that sometimes men take hold of the car in the manner illustrated by counsel, and you also stated that they weren't supposed to do that. What do you mean by that? Did you have some rule that the men were supposed to follow or observe?

A. If a man saw that there was no cross-pieces in it, it was no place for him.

THE COURT: But did you have any rule governing the men, or which was supposed to govern the men, as to how they should move this car, where they should take hold of it?

A. No, sir.

THE COURT: That is all.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

MR. PLUMMER: I will call Mr. Brewsted.

HARRY BREWSTED, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Harry Brewsted.

MR. PLUMMER: If Your Honor please, this witness understands the English language fairly well, but not altogether.

THE COURT: Suppose we try him. Avoid adjectives and qualifying words as much as possible, and see if we can't get along. If we need an interpreter we will call him.

MR. PLUMMER: Q. Where do you live.

A. 1323 Mullan Avenue.

Q. This city?

A. Yes, sir.

Q. Who are you working for?

A. Working for the contractor.

Q. You are not working for the Rutledge Lumber Company now?

A. No.

Q. Did you know Mr. Sundin?

A. Yes.

Q. How long did you know him?

A. I seen him up there one time, working there.

Q. Do you know whether or not he ever worked in the Rutledge Lumber Company's mill here, or yard here? Did he work in the yard here of the Rutledge Lumber Company?

A. No, I work on the yard before they start the mill.

THE COURT: You may call your interpreter, I think. What language does he speak?

MR. PLUMMER: Norwegian.

(The interpreter called was thereupon sworn.)

MR. NELSON: If the Court please, may I learn the name of the interpreter, and who he is, and where he lives?

THE COURT: Yes.

MR. PLUMMER: What is your name, Mr. Interpreter?

THE INTERPRETER: Oscar Moberg.

MR. PLUMMER: And where do you live?

THE INTERPRETER: 1311 Coeur d'Alene Avenue.

MR. PLUMMER: Now, Mr. Moberg, I will ask the questions of the witness just like I was talking to him. I wont ask you to ask him so and so. You just repeat what I say.

Q. Did you know Axel Sundin during his lifetime?

A. Yes.

Q. Do you know whether or not Axel Sundin at any time worked in the yard of the Rutledge Timber Company?

A. He said he don't know before he started to working with him.

Q. I didn't ask him when he started to work. They admit in the pleadings that he did work there. Did you know Mr. Sundin when he worked for the Rutledge Timber Company in the yard as a transfer man?

A. Yes.

Q. State whether or not you were present at the time he was injured.

A. Yes.

Q. Were you at that time working for the same company, in the same yard?

A. Yes.

Q. What were you doing, what kind of work?

A. I worked on the transfer cars.

Q. State whether or not you were working on the same transfer car that Sundin was working on at the time he was hurt?

A. Yes.

Q. What other men, if any, were working on this same transfer car that you and Sundin were working on?

A. Knudson and Hegstrom was working with him at the time.

Q. Do you know where Knudson is?

A. He is dead.

Q. When this car of lumber was being moved out how many men were on the end of the car, if any, shoving it?

A. Three.

Q. And I assume that was Hegstrom and Knudson and himself, is that correct?

A. Yes.

Q. Was or was not there any room for any other men on the end of the car?

A. No.

MR. NELSON: If Your Honor please, this witness is answering Mr. Plummer's questions right off.

MR. PLUMMER: Once in a while he does.

THE COURT: I haven't any doubt that he understands Mr. Plummer. The difficulty is in understanding him. I think he understands very well, and if it were not for the difficulty of understanding his answers I would dispense with the interpreter.

MR. PLUMMER: The testimony will be very short. It won't be very long.

Q. Describe on the end of this table how you and the other two men shoved the car out from between the other cars of lumber. Come over here.

(Witness indicated the position with his back to the table.)

Q. When did Sundin take hold of the load?

MR. NELSON: We object to that unless he knows.

A. He says after he get it out far enough so that he could get hold in between the beams on the truck.

Q. State whether or not you saw Sundin take hold of the load to help push it up and shove it out?

A. Yes.

Q. What part of the load did Sundin take hold of? I want to find out whether he took hold of either end, or where, along the side?

A. In the middle, between the two beams.

Q. Just show the court and jury here at this table how he took hold of it.

(Witness indicated with back to table.)

Q. State whether or not that was the usual way that men took hold of the cars when they took hold of the side?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, and not within the issues in this case.

THE COURT: Overruled.

MR. NELSON: An exception.

A. He caught hold wherever he had a chance to.

Q. He didn't answer my question. I didn't ask him where, but how, they took hold.

THE COURT: Ask him how they generally took hold.

A. He said it was customary to take hold wherever they could get a chance.

Q. Tell him to show the jury how the men usually took hold of it when they took hold of the side of the car at all.

A. This way (indicating).

Q. How long did that custom exist there?

MR. NELSON: We object to that as incompe-

tent, irrelevant and immaterial, and not pleaded, and the defense has had no opportunity to meet it.

THE COURT: Sustained. He need not answer.

MR. PLUMMER: Q. How long did you work in the yard there as a member of that transfer gang?

MR. NELSON: I submit, Your Honor, that he has already answered that, that he began working there when the mill opened.

A. He has been working since the mill started last year.

MR. PLUMMER: Q. What kind of lumber was on this car, part of which fell off and caused the injury that produced Mr. Sundin's death?

THE COURT: Is that in controversy, Mr. Nelson?

MR. NELSON: No.

A. One by six, sixteen feet.

MR. PLUMMER: Q. One inch thick and six inches wide?

A. Yes, and sixteen foot long.

Q. How many tiers of that lumber was there on the car?

A. Six tiers.

Q. And how many boards high from the floor of the car?

A. Fifty-six or fifty-five, between fifty and sixty, something like that.

Q. How high was the floor of the car from the rail that the wheels stood on?

A. About two feet.

Q. State whether or not you and the gang you

were working with, known as the transfer gang, had anything to do with reference to putting strips or binders or cross-strips through the load as it was being loaded?

A. No.

Q. After the load had been shoved out from between the other loads and Sundin had got hold of the load as you have described, how far did the load go, being shoved by you four men, before some of it fell off?

MR. PLUMMER: It is admitted that some of it did fall off, Your Honor.

A. He says it went about three feet in on this transfer car before it fell off.

Q. Well, he didn't quite understand me, I guess. How long was this track that this car was on, that the car of lumber was on?

A. Twenty-two feet.

Q. And how long was the car itself? I don't mean the lumber, but the car itself?

A. Eight feet.

Q. Was there or was there not any straps or binders put in on this load at all?

A. There was none at all.

Q. Were you present when the lumber fell off?

A. Yes.

MR. PLUMMER: I believe you admit that the lumber killed him, don't you?

MR. NELSON: Yes, we admit that he was killed by the fact of the lumber falling off.

MR. PLUMMER: Q. When you got to this

transfer car, we will call it, at the end of the track, you and the gang with you, including Sundin, what did you and the gang do, if anything, with reference to attempting to shove the car up on to the other car?

A. They took it back and started it again, to get it up there.

Q. Just tell him to describe just how they did that.

A. He says three of them went behind, and Sundin was on the side, and they took a little start to get her there.

Q. And when they took this start to get it over and it struck the other rail, that is, the rail on the car, what happened then?

MR. NELSON: If Your Honor please, I think the witness—

THE COURT: What does he say, Mr. Interpreter?

INTERPRETER: I want him to explain to me what happened, when he asked me if it was when the lumber got on the car and when it fell.

THE COURT: Tell him to just go on and explain to us what happened from the time they started the car until after the lumber fell, tell it in his own language, and you can repeat it to us.

A. He says they pushed the car so that when it hit the rail and went over, that is when it tipped, when it bumped up on this rail it was higher, and went over on this transfer car, was then the load tipped.

MR. NELSON: We move to strike that out as not responsive to the question, if the court please.

MR. PLUMMER: Oh yes, it is.

THE COURT: Oh, it is responsive.

MR. PLUMMER: Q. State whether or not that lumber that you say tipped was the lumber that fell on Sundin?

A. Yes.

Q. Did you work Saturday in the yard there, doing that same kind of work, the Saturday before Sundin got hurt?

A. Yes.

Q. What shift was you on?

A. He was on the day shift.

Q. State whether or not you saw the tracks there where the accident occurred on Saturday?

A. Yes.

Q. What is the fact with reference to whether one of the tracks was higher—

THE COURT: No.

MR. PLUMMER: Q. Describe the condition of the tracks there.

MR. NELSON: If Your Honor please, I can see how under some issues this would be material, but under others, under the allegations in the complaint, I don't believe it is material in what condition it was on Saturday, unless they are going to connect it up.

MR. PLUMMER: We will connect it up.

THE COURT: I assume that they will connect it up. What does he say, Mr. Interpreter?

A. He says the track on the transfer car was higher than the one on the platform on Saturday.

MR. PLUMMER: Q. How much higher on Saturday?

A. Three-quarters of an inch.

Q. Did you see the same track on Monday, after the accident occurred?

A. Yes.

Q. Describe the condition that you saw there with reference to these tracks on Monday

A. He says it had sunk more then.

Q. How much more?

MR. NELSON: We object to that unless it is before the accident.

A. It was after the accident.

THE COURT: Ask him when he noticed the track on Monday.

MR. PLUMMER: Yes.

A. It was after the accident happened.

Q. How long after?

A. After they sent Sundin to the hospital.

Q. Tell him to describe how much lower it was on Monday when he saw it right after the accident than it was on Saturday.

MR. NELSON: We object to this as immaterial and incompetent, and not within the pleadings in this case.

THE COURT: Overruled. It is in the pleadings that the track was lower, isn't it?

MR. NELSON: Yes, but not that there was a difference between Saturday and Monday. He al-

leged in his complaint that he knew of it, and I took it from his opening statement that he is going to now rely that he was surprised, owing to the difference in the track, and therefore we allege that it is incompetent.

MR. PLUMMER: The plaintiff doesn't allege that Sundin knew of the difference between Saturday and Monday. He says that he knew it was uneven and that one was lower than the other.

THE COURT: Well, unless you allege this I can't permit you to offer it then.

MR. PLUMMER: I alleged that it was lower and the condition of the track was what caused the necessity for this extra shoving of the car to get it on there.

THE COURT: But you alleged that he knew the condition, didn't you?

MR. PLUMMER: I didn't allege that he knew the condition. I alleged that he knew the track was uneven, but the extent of it I didn't say that he knew.

THE COURT: The objection is sustained. You say that while he knew of the difference in height of said track of said transfer car, and the necessity for violent and extraordinary movement of said car, etc.,

MR. PLUMMER: If Your Honor please, it seems to me that that isn't an allegation that he knew the extent of the unevenness and the danger that would result from the combined conditions. He might know that this track was uneven, and at the same time appreciate the fact that if there were binders in there it wouldn't make any difference.

THE COURT: That may be, but that is an entirely different question. If it makes no difference, then it is wholly immaterial to go into it.

MR. PLUMMER: There is this, if Your Honor please: Counsel are going to contend, I assume, from the motion he made after the opening statement, that the men who neglected to put the strips in there, if they did neglect it, were fellow servants. That is a point we will have to argue before Your Honor, I presume. We have a right to show, if Your Honor please, even if the court should take that view, that it was the concurrent negligence of the master and the fellow servant, and the condition of this track is material there for that purpose.

THE COURT: That may be, but that gets back to the question again that was raised before the trial commenced. You come in and present this showing in the complaint. Now at the last moment, just before the jury is called, you desire to withdraw from this statement. Counsel say they have prepared their case upon the theory presented by your complaint, which is very clear, that is, that while he knew of this, still there had been promise to correct it. Now I can't permit you to withdraw from that theory and take an entirely different one, which is now suggested.

MR. PLUMMER: I don't intend to suggest that, if Your Honor please, that is, altogether. My theory is this, that if we are bound by paragraph 17, if the court is going to let it stay in, it shouldn't be construed any stronger against us than the pleadings

would justify. We allege that he knew of the unevenness of the track. It doesn't say that he knew of the extent of it. He did know that it was uneven to some extent. Assuming that he did know that, and assuming that we are unable to show a promise to repair, which I assume we will not be able to show, then the only part counsel desired to remain in there is the first part of it, that says that he knew of the unevenness. The balance is immaterial, of course, so far as he is concerned. It is the admission in there of Sundin's knowledge of the unevenness that counsel wants to stay in. Assuming that that is left in, it amounts to simply the bare allegation that he knew that the track was uneven. Assuming that that is true, it shouldn't be broadened out to the extent that he knew of the unevenness to the extent that it was found to be uneven on Monday, because that was the first load he took out on Monday morning, as the evidence shows here.

THE COURT: But you allege that he knew of every condition which you allege existed, so that if you take that view then you don't allege that it was in worse condition on Monday than it was on Saturday. In other words, you allege first that the track was uneven.

MR. PLUMMER: Yes.

THE COURT: Then your averment of knowledge of that condition is just as broad as the averment of the condition, so that if you take the view that this does not refer to the condition on Monday, then neither does the other allegation allege the condition

on Monday. One seems to be just as broad as the other.

MR. PLUMMER: I see the court's position. That might mean that it isn't alleged specifically in the complaint as to what the condition was on Monday. I presumed the complaint was barren of that allegation, but as I suggested to Your Honor, sometimes we find things out afterwards that we didn't know before. There was no intention to mislead anybody.

THE COURT: That may be, but counsel knows that these cases are very often tried very closely, and that there is often merely a straw between the legal right to submit a case to the jury and the want of that right, and of course if we permit an amendment at this time it may change the whole aspect of the case.

MR. PLUMMER: Yes. I don't want to ask for an amendment so as to have the case continued, or anything of that kind, but this was the thought that I had in mind, that even if he did know of the exact condition of the rails, even to the fullest extent, even Monday, that of course would not charge him with assumption of risk, that is with knowledge of the danger incident to the condition of the rails, combined with the failure to load the load safely, because he would have to have knowledge of both concurring conditions in order to assume the risk of the accident that happened.

THE COURT: Of course that is a question of law that I will hear you upon if you desire when the proper time comes. I can't see that that is necessarily involved at the present time.

MR. PLUMMER: That is all.

MR. NELSON: Shall I proceed, Your Honor?

THE COURT: Yes.

CROSS EXAMINATION by

MR. NELSON:

Q. Where do you live, Mr. Brewsted?

A. 1323 Mullan Avenue.

Q. With whom do you live? Are you a married man?

A. No.

Q. With whom do you live, or board?

A. Mrs. Sundin.

Q. How old a man are you?

A. Thirty-five years.

Q. You say you knew Alex Sundin in Libby, Montana?

A. Yes.

Q. For whom did Sundin work in Libby, Montana?

MR. PLUMMER: I think I shall object to that as not cross examination.

THE COURT: I suppose this goes to his knowledge of the business. The objection is overruled.

A. I worked in the dry shed there, when I see him, for the Libby Lumber Company.

Q. Ask him if he didn't load lumber from off of trucks or carts into cars at Libby, Montana, and as a part of that work move these carts of lumber around on the platform?

MR. PLUMMER: We object to that as not cross

examination. It is immaterial as to what they did in some other yard back east.

MR. NELSON: Just to show, if Your Honor please, that he was an experienced man.

THE COURT: He may answer. The objection is overruled.

A. He didn't see any of that because he didn't work in that yard.

THE COURT: The witness didn't?

INTERPRETER: No.

THE COURT: Put your questions directly.

MR. NELSON: Q. Under what foreman did you work at Libby?

INTERPRETER: George Erickson?

THE COURT: Mr. Interpreter, you must just repeat what he says. You must not suggest his answers.

INTERPRETER: He says he worked for the chain foreman. I was working there at the same time, under the same foreman as him.

THE COURT: Yes, but you aren't permitted to testify at this time.

MR. NELSON: Q. Ask him if he ever saw Sundin at Libby, Montana, working or moving trucks of lumber up to the car and loading it into the car?

A. He never seen it.

Q. Come to this table, and supposing this table was the truck of lumber that you was working on when Sundin was hurt, and come here to this end of the table, and show the position that you were in, that Hegstrom was in, and that Knudson was in,

at the time you pushed that truck out. You were pushing it south, weren't you? Were you pushing the truck of lumber south?

A. He pushed it towards the lake.

Q. Go to the other end of the table and show *were* you were at the end of that truck of lumber supposing this table to be the truck of lumber what position you were in. This was at the end of the truck of lumber?

A. Yes (indicating).

Q. Where was Knudson?

A. I think Kundson was over here.

Q. At this corner?

A. Yes, sir.

Q. Was he in this position (indicating)?

A. Yes.

Q. Where was Hegstrom?

A. In the middle.

Q. In the middle?

A. Yes.

Q. Was he with his back against the end of the load of lumber also?

A. Yes.

Q. You shoved away from the transfer shed which ran along here at the end of this load, did you not?

A. Yes.

Q. Did you get that load to going pretty fast?

A. He says it went pretty good until it got over towards the transfer car.

Q. It went pretty fast until it got to the end of the transfer car?

A. It didn't go very fast, but it went all right.

Q. It kept going all right?

A. Yes.

Q. In which direction was your face when you were pushing that car out from the chain shed?

THE COURT: What do you mean by that? He has showed you how he stood.

MR. NELSON: Q. Was your face towards the chain shed, this way, when you were pushing?

A. He says when they started the load.

Q. In what position did you change?

A. He says he turned around the minute it started to go up on the transfer car, then he turned around.

Q. He turned around when it went up on the transfer car?

A. Yes, sir, with the first two wheels.

Q. You did not turn around until the truck you were pushing went up on to the transfer car?

A. He says he turned his head alongside of the load so he could see.

Q. When did you do that?

A. He was looking alongside that load that he was pushing out.

Q. Where was the load when you first turned your face alongside of it?

A. He says he can't tell exactly how far it was.

Q. Was the load up on the transfer car? Were two wheels of the load up on the transfer car?

A. He says the minute it went up on the transfer car he turned himself.

Q. Is that the first time you turned and looked along the transfer car, when the two wheels went up on the transfer car?

A. No.

Q. When did you first turn and look along the side of the car you were pushing?

A. He says he can't tell exactly the first time he turned.

Q. As nearly as possible, tell me where the car was that you were pushing when you first turned and looked towards it?

A. He says when it stopped by the transfer car the first time.

Q. When it stopped by the transfer car the first time?

A. Yes.

Q. Had the car been going all the time from the time you first began shoving on it until it went up on to the transfer car?

A. Yes.

Q. How many times did you push it up against the transfer car?

A. Three times.

Q. What position were you in the second time you pushed the car of lumber up against the transfer car?

A. He says he had his back to it until he come to the transfer car, and then he turned around and pulled it back again.

Q. That was the second time?

A. The second time.

Q. What position were you in the third time when you pushed the car of lumber up against the transfer car?

A. He had his back to the load, he says.

Q. How long a time did it take from the time you began shoving the car away from the transfer shed, was it until Sundin was injured?

A. About three minutes.

Q. About three minutes?

A. He says it wasn't a long time, about three minutes, he says.

Q. What did Sundin do when you began pushing the load back towards the transfer shed?

A. He helped push it back.

Q. What position did he take when he helped push it back to the transfer shed?

A. He says he stood on the same side, with his back towards the load.

Q. Did this load that you were pushing away from the transfer shed stop at any time during those three minutes?

A. It stopped up against the transfer car, and they pushed it back and took a new start on it.

Q. Did you stop and get your breath when you did that?

A. No.

Q. How long at any time did the car remain still during those three minutes that you were pushing it from the shed up on to the transfer car?

A. He says he didn't know how long it was still.

They just changed and pulled her back as soon as they bumped up against the car.

Q. Was Sundin in about the middle of the car from end to end, on the side of it?

A. He says he was between the two beams of the truck.

Q. That is about the middle of the car, is it not?

A. Yes.

Q. Ask him how many tiers of lumber there are usually above the last cross piece in a load of fifty to sixty tiers high?

A. He says there is a difference, sometimes more and sometimes less.

Q. A difference in loads,—sometimes there are twenty or thirty tiers, are there not, above the last cross piece in a load of from fifty to sixty tiers high?

A. No, he says.

Q. How many, about?

A. From four to six.

Q. How many cross pieces then would there be usually in a load of from fifty to sixty tiers high?

A. He says it all depends on the width of the lumber.

Q. In six inch lumber, one inch thick, six inches wide, sixteen feet long?

A. He says you can put up to half a dozen.

Q. Are there usually six cross pieces in a load of six inch lumber, white pine, of from fifty to sixty tiers high?

A. He says he has seen up to about five or six in a load of that size.

Q. Ask him if that is what is usually in a load of that size.

A. Yes, he says.

Q. Usually how far do these cross pieces stick out at the side of a load?

A. He says sometimes they are even, and sometimes they are inside.

Q. Do they not usually stick out about four to six inches from the side of the load?

A. He says he hasn't hardly seen that, he says. He says they lay that piece right kitty-cornered over. He says lots of times you can see them and lots of times not.

Q. Do you mean to say that the cross piece would not come out to the side of the load?

A. He says that if they lay them directly across. He says it all depends on how they lay the cross pieces.

Q. How do they usually lay the cross pieces?

A. He says they sometimes lay them straight over, and sometimes they lay them this way (indicating).

Q. Ask him how do they usually lay them.

MR. PLUMMER: We submit that he has answered that, if Your Honor please.

THE COURT: No. He may answer.

A. He says that is the only way he has seen them; sometimes they come right straight across, he says, and sometimes this way.

THE COURT: Which way is the more often?

A. He says he has seen both of them, and he don't know which one there is the most of.

MR. NELSON: Q. What good would it do to put in a cross piece if it didn't come to the side of the load?

MR. PLUMMER: We object to that as argumentative.

THE COURT: Overruled. This is cross examination.

A. He says it don't have to stick outside of the load to do any good.

MR. NELSON: Q. Do they usually come to the side of the load?

A. Yes.

Q. Did you ever work on a transfer shed or transfer platform before you began working for the Rutledge Timber Company?

A. No.

Q. Do you remember Mr. Hugh Kennedy, and Mr. Bert Kennedy and myself talking to you one day last week about this case?

A. He says you inquired some few words about it.

Q. Ask him if Mr. Cromblath was also there.

A. Yes.

Q. Ask him if he did not at that time and place, and in the presence of these men whose names I have mentioned, tell Mr. Kennedy and myself that he did not see where Sundin was just prior to the accident?

A. He says he never said it.

Q. Ask him if he did not at that time and place, and in the presence of the men whom I named, say

that he did not see where Sundin took hold of that car of lumber?

A. No.

Q. Ask him if Sundin could not have turned his face around and looked at the side of that car of lumber and have seen whether or not there were cross pieces in the load?

MR. PLUMMER: We object to that as calling for the conclusion of the witness.

THE COURT: Yes, I think the jury is just as competent to answer that question as he is.

MR. NELSON: Only he has worked around these cars all the time.

THE COURT: But isn't it obvious that the deceased could have seen it if he had turned around to look at it?

MR. NELSON: Well, if it is obvious, that is—

MR. PLUMMER: We admit that.

MR. NELSON: Q. Wherever these cross pieces were in the load there was an opening between the boards, was there not?

THE COURT: That must necessarily follow.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How thick were these boards that were usually used for cross pieces on these loads?

A. He says they use lath.

Q. Lath?

A. Yes.

Q. How wide was this car, the car itself, that the

lumber was piled on at the end, where the men had to take hold of it?

A. About forty-three inches, he says he thinks.

MR. PLUMMER: I think that is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. When this car was taken back from the transfer car, when the car on which you were pushing was taken back from the transfer car, how far back from the transfer car did you take it before you again took a start towards the transfer car?

A. About two or three feet.

Q. About two or three feet?

A. Yes.

Q. Did you take it back two or three feet each time?

A. About, he says.

Q. Did you watch Sundin at all of the times that you were moving it back and forth?

A. He says that he looked at the side of the load sometimes and he seen him when he was on the side of the load, and then when he come up on the transfer track.

Q. What is that?

A. He says he seen them when they come up on the transfer track, and every time they changed and pulled the load back and started to shove it again he could see what position he had.

Q. When they got up on the transfer track?

A. Yes, and when they were pushing the load back and took a change he could see.

Q. What position was he in when they pulled the load back?

A. He says, then we turned and had our faces against the load.

Q. Could those men by pulling that load in that manner pull it back?

A. Yes.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

THE COURT: Gentlemen of the jury, I am going to excuse you until nine o'clock Monday morning, and in the meantime you will be very careful to keep yourselves aloof from outside influences. There may be a number of people in this city who are more or less interested in this matter in one way or another, connected either with the interests of the plaintiffs or with the interests of the defendants. Be unusually careful to avoid coming into contact with these influences, in view of the fact that a day will elapse before we can take up the trial again. Return Monday morning at nine-thirty.

An adjournment was thereupon taken until 9:30 A. M. Monday, June 4, 1917.

9:30 A. M., Monday, June 4, 1917.

MR. PLUMMER: I will recall Mr. Brewsted for a few questions.

HARRY BREWSTED, heretofore duly sworn in behalf of plaintiffs, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Brewsted, I will show you a photograph, and ask you to state whether or not that appears to be a substantially correct description of the short tracks and the lumber shed that has been referred to in your testimony?

A. He says if he understands the picture.

Q. I am asking him if that picture appears to describe or show these short tracks?

A. Yes.

MR. PLUMMER: I will offer this in evidence then.

MR. NELSON: For the purpose of showing those tracks, we have no objection to it, but there are other things that are entirely different now than at that time, but for that purpose only we do not object.

MR. PLUMMER: In asking him other questions I have got to refer to this car here. Of course that isn't the same kind of a car that was used at that time. I will have to have him explain that difference. We don't claim that it is the same kind of a car.

Said photograph was thereupon marked PLAINTIFFS' EXHIBIT NO. 1.

Q. In this photograph, Plaintiffs' Exhibit No. 1, there is a car on a track running at right angles with the short tracks that you have described. State what sort of a car was used on that transfer track upon which you and your gang were trying to put this load of lumber. Show the difference between this one and the one that was actually used.

MR. NELSON: We object to that as incompetent, irrelevant, and immaterial, if the Court please.

THE COURT: Sustained. You admit that this isn't the kind of a car that was used.

MR. PLUMMER: Q. What sort of a car was used on the transfer track, being the track running at right angles with these short tracks? Describe that car.

MR. NELSON: We object to that as incompetent. No complaint was made against that car, and it is wholly immaterial.

THE COURT: Oh, no. It is just to get before the jury the general situation. He may answer the question. Is there any question about what kind of a car it was?

MR. PLUMMER: I don't know. I want to have the jury have the full situation before them.

THE COURT: Well, he has given the width of the car used that day.

MR. PLUMMER: No, Your Honor.

THE COURT: You mean the large car?

MR. PLUMMER: Yes.

THE COURT: Very well. I thought you were referring to the car they were pushing out.

MR. PLUMMER: No. The car they pushed out they pushed onto this car.

Q. Just describe this car I referred to, running at right angles—this transfer car, what kind of a car was that?

MR. NELSON: We object to that as wholly immaterial.

THE COURT: Overruled.

A. He says it was one made out of wood.

Q. Was it a flat car or a box car?

A. A flat car, with two tracks on it.

Q. What were the two tracks used for?

A. So that they could take one or two cars, as they seen suitable.

Q. Referring to the ends of these short tracks upon which the car was going that you and your gang was pushing on the day that Mr. Sundin was killed,—I am referring now to the ends of these short tracks—how were the ends of those rails kept with reference to the rails on the flat car that you have described, ordinarily kept?

MR. NELSON: If Your Honor please, we object to that as irrelevant, incompetent, and immaterial, and not within the issues in this case.

THE COURT: Sustained.

MR. PLUMMER: Does Your Honor hold that we can't show the condition of the tracks? I will state, if Your Honor please, that in offering that we are charging the defendant here with negligence in maintaining a track in a defective condition. The mere showing of the existence of a condition isn't showing negligence unless you show that it is an abnormal condition or a condition that doesn't ordinarily exist or that is not in an ordinary form. We want to show how it was usually kept, whether on a level or otherwise, and then show the condition this particular track was in at the time the accident happened, which

makes the connection, showing negligence. It is absolutely essential, it seems to me.

THE COURT: The only difficulty about that is that you haven't alleged what the usual manner was, and you have alleged that the deceased knew of this condition.

MR. PLUMMER: I am afraid the court is probably confounding assumption of risk is one proposition, and negligence of the master is another. First we have got to show the negligence of the master.

THE COURT: Yes, but have you alleged anything about the other tracks?

MR. PLUMMER: I have alleged that they negligently permitted them to sink down lower than was safe.

THE COURT: Then why is it material to know how the other tracks were?

MR. PLUMMER: For the purpose of comparison.

THE COURT: The objection is sustained.

MR. PLUMMER: Plaintiffs offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employees were attempting to place the loaded car of lumber, and that on that particular track that this car of lumber was being shoved over, the ends thereof were allowed by the defendant to get in a condition—

THE COURT: That is another question.

MR. PLUMMER: All right then. Just the first part is what I will offer. For the purpose of showing, or at least showing circumstances tending to prove negligence on the part of the defendant in maintaining and permitting the track to be in the condition it was in at the time he was injured.

THE COURT: The offer is denied, for the reason that there is no averment in the complaint charging that the other tracks were kept in any particular condition, or that the deceased knew of any such condition.

MR. PLUMMER: Q. On the day of the injury and immediately after the accident to the deceased, state whether or not you saw the track under the car at the point where the accident occurred?

MR. NELSON: If Your Honor please, we object to that for the same reason, the same objection that was made Saturday, and the objections were sustained at that time,—incompetent and immaterial.

THE COURT: This is objectionable because it is repetition. He testified that the track was considerably lower immediately afterwards than it was the night before.

MR. PLUMMER: I wasn't sure that I had covered that, if Your Honor please.

THE COURT: Yes.

MR. PLUMMER: How much lower was the track on Monday, right after the accident, that is, the ends of the rails, of this short track, how much lower was

that, if any, than the rails on the car which run at right angles with the car you were shoving?

MR. NELSON: We object to that as repetition.

THE COURT: I think it is. I think he gave the precise distance, but I am not sure. He may answer now.

A. Close to one and a half inches.

MR. PLUMMER: There are one or two little questions that I don't think I covered. I am not positive. I don't think I did.

Q. Before you and Knudson and Hegstrom started the car, while the car was yet standing still, before you started it, what was on the cars on the tracks on the side of this particular one you were shoving?

A. There was lumber loaded on them.

Q. What part of the load fell off that killed Sundin?

A. The part at the right side.

Q. State whether or not any of the left side fell off?

MR. NELSON: We object to that as immaterial.

THE COURT: Overruled.

A. No, he says.

MR. PLUMMER: I would like to show, if Your Honor please,—I don't know whether or not the pleadings are specific on that—just the general manner of carrying on that work. It might appear at first to be immaterial, but I want to show just how much the deceased was around there when the loading of these cars were carried on.

Q. When did you and your gang take a car out,—when would you take a car out, a car of lumber, out to this transfer car?

A. When they had time and when the loads were high.

Q. What would you be doing before you would take a load out, you and your gang, including Sundin, I mean, before you would take out any particular load, for instance, this load, before you would take this load out, what would you and the gang be doing before that time?

A. He says they would go out in the yard with some loads and come back after some more.

Q. How far did you have to take these loads out into the yard away from where they were loading on the cars that were standing still?

A. He says that all depends on where they went.

Q. I just want to get the general distance, is all, to get some idea about it, is all.

A. He says he can't tell.

Q. How long would you and your gang usually be gone away from where the men were loading on to these cars down at the mill, when you were taking the cars down?

A. He says it all depends on how it went. He said it could take a longer and a less time.

Q. Well, give some idea about how long it was, if he can. I don't know anything about it.

A. Well, he says it all depends on whether they went to the first alley or out to the last alley.

Q. How long would it be if they went to the first alley?

A. About five minutes.

Q. How long would it be if he went to the last alley?

A. Ten or twelve minutes. It all depends on how many loads they have.

Q. You were asked a question by Mr. Nelson as to whether or not you were boarding with Mrs. Sundin. State whether or not there are other men boarding there with you, Mr. Brewsted?

A. Yes.

Q. How many?

A. Six.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. NELSON:

Q. You are quite friendly to Mrs. Sundin, are you not, Harry?

INTERPRETER: I don't know how to state that.

Q. Ask him if he and Mrs. Sundin are not very good friends.

A. Not any more than any other friends.

Q. Ask him if he doesn't drive around with her a great deal in her auto.

MR. PLUMMER: I think I shall object to that under the circumstances here, if Your Honor please.

A. No.

MR. NELSON: This car that you were pushing out at the time of the accident was on the second track from the end of the chain shed, was it not?

A. The second load, he says.

Q. This accident happened between ten and eleven o'clock, did it not?

A. Nine and ten.

Q. Between nine and ten?

A. Yes.

Q. That morning from seven o'clock until the time of the accident happened you had been working on the transfer platform, had you not?

A. Yes.

Q. Just before the accident had not you and Knudson and Sundin and Mr. Moe taken out a load from the north side of the transfer platform out to the yard and had returned from taking that load out?

A. Yes.

Q. When you were returning from taking that load out, and when you were right at the little office at the west end of the transfer platform, do you remember Mr. Moe saying, "We will take that load out next," and pointed over to this load which you were moving at the time of the accident?

A. He says that Moe told him to go over on this other side after they had been out in the yard.

Q. Do you not remember, when you were right at the little office on the west end of the transfer platform, and were going along with Mr. Moe and Mr. Knudson and Mr. Sundin, that Mr. Kennedy called Mr. Moe into the office just prior to the accident?

A. He says when he was going over he met Moe on the platform.

Q. Ask him if he remembers Mr. Kennedy calling Mr. Moe into the office.

A. He says he met him, but he says where he went he don't know.

Q. He met Mr. Moe?

A. Moe, he says.

Q. How high was this load on the first track at the time you moved the load on the second tracks?

A. He says he can't say just how high it was.

Q. What is your best remembrance as to how high the load was?

A. He says he never paid no attention to it, so he can't say.

Q. If it had been as high or nearly as high as the second load you would have taken it first, would you not?

MR. PLUMMER: We object to this as wholly immaterial, and, second, it isn't cross examination, and calls for his conclusion as to what he would do. What he would do about some other load is wholly immaterial.

THE COURT: I don't quite understand your question, Mr. Nelson.

MR. NELSON: If Your Honor please, they have attempted to prove that on account of this load being at the side of it, Sundin couldn't have seen the second load, as to whether or not there were cross pieces on it. My purpose is to show that if this load was anyway as high as the second load they would have taken this first one out first, and if it was not as high he could have seen whether or not there were any cross pieces in it. I think it is entirely in the cross examination, to show the height, and that is one of

the things that would show the height, as to when they would take it out.

MR. PLUMMER: The evidence shows that he did take it out on orders from Moe, and he can't tell what would be in Moe's mind as to when this should be taken out.

THE COURT: Ask him first the direct question as to whether this was as high as the second load.

MR. NELSON: Q. Was the load on the first track as high as the load on the second track? How high was it, about?

A. He says he can't say exactly. He says he never paid no attention to it.

Q. What kind of lumber was it,—dimension lumber or six inch lumber?

A. He says he don't know exactly, but he thought it was two inch.

Q. He thought it was two inch. How wide?

A. He says he aint sure, but he thinks it was two by twelve.

Q. Two by twelve?

A. Yes.

Q. How long?

A. Fourteen feet.

Q. Fourteen feet?

A. Yes.

Q. I would like to get a direct answer to my question, which I haven't been able to get, and I want to repeat it. When you and Knudson and Sundin were coming from the north across the end of the transfer

platform, did not Moe say, "We will take out that load next," and point to this one?

A. He just told them to go over on this side.

Q. And didn't tell them what load to take out?

A. No.

Q. Do you remember when this picture was taken by Mr. Black and the photographer?

A. He says that there have been so many that took pictures out there that he didn't know.

Q. Ask him if he remembers Mr. Black being down there.

A. He says he seen him once, but he didn't see him take any pictures.

Q. Does he know how many pictures he took?

A. No, he says he didn't look at how many he took.

MR. BLACK: If the court please, I object to this imputing that I was there at all and took this picture. I wasn't there and took this picture, and it might leave an inference, if it was left this way, that I was. I wasn't there and took any picture.

MR. NELSON: I was informed by one of the men that it was Mr. Black, he thought, and that was the reason I asked the question.

MR. BLACK: No, I went out one day when it was snowing hard, and I didn't take the picture, and then I sent a photographer out to take this picture.

THE COURT: Then you were guilty of the attempt.

MR. BLACK: I didn't know that it was any offense, if Your Honor please.

THE COURT: I can't see that there would be anything wrong in going out and taking a picture. It would be perfectly proper for Mr. Black to go out and take a picture, if he knew how.

MR. NELSON: It certainly would.

THE COURT: Has he testified as to how long the deceased had been working at this particular employment before he was killed?

MR. PLUMMER: I am not sure. I will ask him, to be sure.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How long had Mr. Sundin been working at this same kind of work before he was killed?

A. He says he started the 3rd of April, and he started at night.

Q. The same time?

A. He says he didn't think the night shift started right away.

Q. About how long does he know that Sundin was working there before he was killed? About how long does he know that?

A. He says he can't say exactly, because he comes at night. He says Moe will know.

MR. NELSON: If Your Honor please, Mr. Moe has already testified that he went to work April 3rd.

THE COURT: All right then. I just wanted to be sure.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

OLAF HEGSTROM, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Olaf Hegstrom.

Q. Where do you live?

A. At Deer Park, Washington.

Q. Did you at any time work for the Edward Rutledge Timber Company here close to the city?

A. Yes, sir.

Q. State whether or not you worked there at the same time Sundin worked there?

A. Yes, sir, I did.

Q. What kind of work were you and Sundin doing during the time he worked there and the time you worked there?

A. That morning?

Q. That, and before that time, during the time Sundin worked there.

A. I was working out in the yard.

Q. What kind of work were you doing in the yard?

A. I was taking out the lumber, stripping out some lumber.

Q. What work were you doing on the morning that Sundin got hurt, what were you and Brewsted and Knudson doing that morning?

A. I don't quite remember.

Q. Well, do you remember Mr. Sundin getting hurt?

A. Yes.

Q. Just go ahead and tell the court and jury just how it happened, in your own way, just go ahead and tell how he got hurt, just the same as though you were—

A. We was taking out a load on the south side, and I and Brewsted and Mr. Knudson was pushing behind the load, and when we pushed, it stopped when we got to the transfer platform, and then we took it back and tried it again.

Q. Tried what?

A. Tried to get it on again, and we maybe tried it two or three times,—I don't quite remember,—and then the last time we tried it it went right over and the lumber tipped over.

Q. Why did you have to try it the number of times that you did, to get it up on this car?

A. Because we didn't get it up there the first time.

Q. Why couldn't you?

MR. NELSON: If Your Honor please, we object to that.

A. It stopped against the track, the end of the track.

MR. PLUMMER: Q. When you say you was trying to get it up on the transfer track, state whether or not you refer to your car, upon which was two tracks, when you say you wanted to get it up on the transfer platform, is that what you mean?

A. Yes.

Q. When this load went off what did you do about putting the load back on again, or doing something with the lumber, after the lumber had fallen off, or part of it, what did you do then with the lumber?

A. I put some of the lumber on an empty car standing on another track, and some of it I put back on the load.

Q. State whether or not there were any strips or cross pieces or binders on this load at all.

A. No, sir.

Q. The strips that are ordinarily used there, cross strips that I speak of, what was the size of those that they usually used there?

A. It was lath.

Q. Lath?

A. Yes.

Q. And how were they usually placed between the boards, that is, what—

MR. NELSON: If Your Honor please, we object to this. There is no allegation of negligence as to how they placed them, or what kind of cross pieces they used. It is admitted that we usually used them.

THE COURT: No, but this is bearing upon the question, I suppose, as to whether or not they were easily observable.

MR. PLUMMER: Yes, that is our point.

MR. NELSON: All right.

MR. PLUMMER: Q. Say there are boards put down there, and you want to put a cross piece on, how are they usually put on?

A. Sometimes I seen them that way, straight across.

Q. That is at right angles?

A. Yes.

Q. All right.

A. And lots of times I see them that way (indicating).

Q. On an angle?

A. Yes.

Q. All right. And when they were on an angle, as you have described here, like that, state how far they would extend through the load, if at all?

A. How do you mean?

Q. Well, I want to find out, when they are put in this way, I want to know whether or not they would extend out to either side.

A. Well, not always.

Q. Before you started this load, you and the other four men,—you three men started it first, you and the other two men, before you started on the load, when it stood still, after it had been loaded up, what was on either side of it, on the other tracks, if anything?

A. There was loads of lumber.

Q. When you tried to get your car of lumber up to this transfer car that you have described, three times trying to get it up there, state whether or not the other end of that same load had come out and away from these side loads that was there on either side of your car before it started?

A. No, sir.

Q. It hadn't?

A. No.

Q. How far did it extend back there?

A. I couldn't tell.

Q. Well, about how far?

A. Well, I never looked; I don't remember.

Q. Did you look at the track after the accident occurred at any time, where the accident did occur, where you say it bumped against the track as you tried to put it up on the transfer car?

A. No, sir.

Q. Did you look at the tracks after that at all?

A. No, sir.

Q. At any time?

A. No, sir.

Q. You never did?

A. No, sir.

Q. When these cars were taken out into the yard what was done with the lumber there?

A. It was piled up.

Q. In big stacks?

A. Yes, sir.

Q. Like an ordinary lumber yard, I presume?

A. Yes, sir.

Q. What did you have to do with that?

A. I piled it up after they started the pile.

Q. In handling that lumber could you tell about how many pieces was usually put in between these loads when they were loaded on the cars?

A. It all depends on the kind of lumber.

Q. How many were usually put in these loads that fell—of the size that fell on Mr. Sundin?

A. Maybe two, maybe four, or maybe five or six.

Q. What would determine the difference, as to number, just describe that, will you?

THE COURT: Why do you have more sometimes than others?

A. Because this narrow lumber is very easy to fall over.

MR. PLUMMER: Q. And what are the widths of the lumber, what are the usual widths? What do you mean by narrow lumber and wide lumber?

A. One by six is narrower than one by twelve, and easier to tip over.

Q. But there is some lumber that you have there that is twelve inches wide?

A. Yes, lots of that.

Q. Any wider than that?

A. I don't remember.

Q. What was the width of the lumber that fell over on Sundin?

A. One by six.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. Usually in a one by six load they had about six pieces, did they?

A. Maybe three, maybe four, and maybe five or six.

Q. And that morning when you pushed this load

out and it stopped, how far did you take it back before you started with it again?

A. I don't remember.

Q. About how far? Just your best judgment.

A. Maybe two or three feet.

Q. Two or three feet?

A. Yes.

Q. You couldn't get very much of a start with a load as heavy as that in two or three feet, could you?

A. Yes, we could get a little start.

Q. Are you sure that you didn't take it back more than two or three feet?

A. Well, maybe we did; I wouldn't say for sure.

Q. Mr. Hegstrom, did you regularly work on the transfer gang?

A. No, sir.

Q. You were just helping out with that load?

A. Yes, sir.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Who told you to help with this load?

A. Mr. Moe.

Q. You said there was three men, including yourself, on the end of the car when you started?

A. Yes, sir.

Q. State whether or not there was any room there for any more.

MR. NELSON: We object to that as calling for a conclusion.

THE COURT: Overruled.

MR. NELSON: We except.

MR. PLUMMER: Q. Was there any room there for any more to push that car at the end?

A. No, sir.

Q. How wide are the tracks, that is, between the rails, how wide are the little tracks?

A. I don't know how wide.

Q. Just measure with your hands as near as you can estimate it. I don't know either.

A. Maybe that wide (indicating).

Q. How wide was the load of lumber?

A. About thirty-six inches.

Q. Don't you know, as a matter of fact, Mr. Hegstrom, that often four men do get back of those loads and shove on them?

A. No, sir.

Q. How many loads have you helped shove out?

A. Well, I don't know.

Q. About how many?

A. Well, I couldn't tell, because I don't remember.

Q. About how many days did you help shove out loads?

A. I wasn't there any whole days.

Q. You weren't there any whole days?

A. No, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

OLGA SUNDIN, called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Your name is Mrs. Sundin?

A. Yes, Mrs. Olga Sundin.

Q. You are the plaintiff in this action?

THE COURT: That is conceded, I suppose.

MR. PLUMMER: I guess it is.

Q. How old was Mr. Sundin at the time of his death?

A. Thirty-nine years.

Q. What was the condition of his health at all times before he died?

A. He was in good health.

Q. What was his custom with reference to being employed, whether or not he was employed at different times or all the time? I want to get his general employment. Do you understand that?

A. No.

MR. PLUMMER: I don't like to lead the witness, but at the same time I don't see how I can make her understand in any other way.

Q. How much of the time did he work?

A. All the time.

Q. How long were you married?

A. Sixteen years.

MR. PLUMMER: I believe the children are conceded to be the children of these parents?

MR. NELSON: Oh, yes. We will concede all those facts.

MR. PLUMMER: Q. Just tell the ages of the children.

A. Twelve years.

Q. The oldest?

A. Margaret.

Q. Margaret is twelve?

A. Yes.

Q. What is the next one?

A. Nine.

Q. Iver is nine years old?

A. Yes, sir.

Q. And Eugene?

A. Nine months.

Q. Eugene was born after Mr. Sundin died?

A. Yes.

Q. What was Mr. Sundin earning at the time he was hurt, how much a day?

A. \$2.75.

Q. What had been his business before he worked down here at this job?

A. Lumber grader.

Q. Lumber grader?

A. Yes.

Q. How long had he worked at the business of lumber grader before he was killed?

A. Five years.

Q. Do you know what the wages of a lumber grader are?

MR. NELSON: We object to that as incompetent, irrelevant, and immaterial, unless qualified.

MR. PLUMMER: Well, at the time he was killed, I presume.

MR. NELSON: Where?

MR. PLUMMER: Here, of course.

MR. NELSON: He wasn't working as a lumber grader here.

MR. PLUMMER: I know, but I thought maybe she might know. All right. I will withdraw that.

Q. What were his habits? Did he have any bad habits?

A. No.

Q. Did he drink?

A. No.

Q. How did he act towards the children?

A. Good. He raised them good, and tell them not to steal or lie, and was very good.

Q. Did he show any interest in training the children, to bring them up as good citizens?

A. Yes.

Q. Now during the time that you and he were married did you accumulate any property?

A. Yes.

Q. What property did you accumulate from his wages?

A. We got a home.

Q. How much is that worth, about?

A. About a thousand dollars.

Q. What other property did he accumulate from his wages?

A. We got a lot in Deer River that he bought.

Q. How much did you pay for that?

A. Two hundred dollars.

Q. And what other property did he accumulate?

A. Bought a lot in Duluth but had to quit it after he was killed.

Q. How much had you paid on that before he died?

MR. NELSON: We object to that.

THE COURT: Overruled.

MR. PLUMMER: How much did he pay on that lot?

A. We paid about \$150. We should have paid \$800, but—

Q. I suppose that he bought household furniture and equipment for your house, besides that, did he?

A. Yes.

Q. Did he buy anything else for you?

A. Yes, he bought an automobile.

Q. This Ford machine you have here?

A. Yes.

MR. PLUMMER: I guess you may take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. When you say he worked all the time, you mean he worked all the time there was work?

A. Yes; there was times he was laid off.

Q. He was a good, steady workman, you mean?

A. Yes, you bet.

Q. But at times the mill would shut down, would it not, both here and other places?

A. Then he worked on the river other places.

Q. Did he always work all the year round when he was a lumber man?

A. Yes. When the mill don't run here, he was home then.

MR. NELSON: That is all.

MR. PLUMMER: That is all, Mrs. Sundin. Do you want to recall Mr. Moe?

MR. NELSON: Yes.

MR. PLUMMER: Mr. Moe, will you take the stand.

ANDREW MOE, heretofore duly sworn on behalf of plaintiffs, upon being recalled, testified as follows:

CROSS EXAMINATION by

MR. NELSON:

Q. I understood you in answer to Judge Dietrich's question, to state that there were no rules down there about working around these loads. I will ask you whether or not it is a fact that you often warned the men working there under you to keep away from the sides of the loads?

A. Yes, sir.

MR. PLUMMER: I object to that unless it is shown that he warned Sundin, or that Sundin was warned.

MR. NELSON: Q. Is it not a fact, Mr. Moe, that on several occasions you warned the deceased, Axel Sundin, to keep away from the side of the load?

A. I warned them all, I believe numbers of times.

Q. As I understand it, Sundin worked the night shift the Saturday before, and part of the Sunday morning before the accident?

A. I don't remember that.

Q. If he worked on the night shift the week be-

fore, he would have worked Saturday night and Sunday morning, would he not?

A. Yes.

Q. And then there would have been no work on this platform until Monday morning, when the day shifts went on again? There was no work there on Sunday?

A. No, sir.

Q. You stated on your direct examination, as I remember it, that you and Knudson and Sundin and Brewsted had taken the loads away from the north side of the transfer shed that morning, and were starting to take out the loads on the south side just before this accident?

A. Yes, sir.

Q. Do you remember as you were going across the west end of this platform, that you said to Sundin and Knudson and Brewsted, "we will take out that load next," and pointed to this load that afterwards part of it fell?

MR. WERNETTE: I object to that, if Your Honor please, as not proper cross examination.

MR. NELSON: If Your Honor please, he stated on direct examination what they had done just previous to the accident, and Mr. Plummer has spoken here about what directions were given these men as to what loads to take out.

MR. PLUMMER: You denied that, though.

MR. WERNETTE: If it is for the purpose of impeachment it wouldn't be a proper question at the present time.

THE COURT: He didn't go into the particular subject as to just what occurred there. As I remember it, this witness was asked to state just what did occur there, and of course that would open the door for cross examination on the whole subject. I think I shall let him answer.

(Question read.)

A. Yes, I did.

Q. Then you could see that load from the west end of the platform at that time?

A. Yes, sir, we could see it.

Q. It was all out in the daylight, all of this work?

A. Yes.

Q. No roof over where they were working or anything?

A. No, not where they were working, no.

Q. I will ask you if it is not a fact, Mr. Moe, that there are ten tracks west of the west end of the chain shed, out here?

A. Yes, sir.

Q. And out at the end, at this west end of this platform, there is a little office is there not?

A. Yes, sir.

Q. Usually when they are loading these cars from the chain, they load lengths of lumber, or lumber of the same lengths, together, do they not? That is, if they load a car of sixteen foot, six inch stuff, they usually load a car of sixteen foot stuff next to it, or close to it? They usually load the same lengths together?

A. We usually do, but sometimes we can't.

Q. Now, Mr. Moe, those cars or trucks are eight feet long, are they not?

A. I have never measured one, but I should judge about that.

Q. And they are two feet from the rails to the top of these cross beams?

A. I never measured them either, but I should judge they are about that.

Q. That truck you see in this picture, on this side of the first load, on the south side, fairly represents the trucks that were used down there?

A. Yes, sir.

Q. Mr. Moe, in twelve inch timbers, two and three inches wide, I will ask you whether or not cross pieces are used in that kind of a load as much as in the inch stuff, six inches wide?

A. Very seldom use cross pieces in twelve inch boards.

Q. That is the general practice in all lumber yards?

A. Wherever I have seen it.

Q. And you have worked in a number of them have you not?

A. Well, not so very many, but for a good many years.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, counsel asked you about warning the men, and you answered that you warned all of them.

Now in warning them what did you say, what was your expression that you used?

A. Oh, if I see a load that I thought wasn't quite safe, I said, "Boys, keep away from that side," whichever side I might think was unsafe. I done that lots of times.

Q. And that is what you meant when you answered his question?

A. That is what I meant.

Q. Do you recall at any time having warned Sundin himself?

A. I don't know if I exactly warned him individually, but there were always three together, and I would talk so that they would all hear.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. Mr. Moe, isn't it the custom in all yards that you know of in this vicinity for the men who are handling these trucks themselves to observe as to whether or not there are cross pieces in a load, or whether or not the load is solid on the truck?

MR. PLUMMER: We object to that as simply calling for his conclusion, if Your Honor please, and second, it isn't cross examination. He is trying to prove his assumption of risk by our witness. We haven't asked him anything about—

THE COURT: Sustained.

MR. NELSON: That is all.

MR. PLUMMER: We rest.

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to

time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

THE COURT: Why wouldn't they be safe? I mean what would be the reason for the peril? Can you give us an illustration?

A. Well, sometimes the chainers don't pay close enough attention to loading it straight and nice, and sometimes there will be a ruck a little bit for a few minutes, and they wouldn't place them exactly the way they should, and lots of reasons, and once in a while there will be a load that isn't safe.

THE COURT: That is all.

RE-CROSS EXAMINATION by
MR. NELSON:

Q. Is it not a fact that always above the last cross piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards sometimes; if the transfer men think the load is big enough they will take it out, even though the cross pieces are right on the top.

Q. But usually there are a number of tiers above the last cross pieces?

A. There should be, and usually is.

Q. Is it not a fact that a board may fall off, no matter how well a load may be loaded?

MR. PLUMMER: We object to that as immaterial, and not cross examination.

THE COURT: Sustained. Well, read that answer.

(Last answer read.)

THE COURT: The objection is overruled.

A. Yes, and it might fall off, no matter how they were loaded, I have seen that.

Q. And a tier of a load or the top of two tiers or three tiers might slide off of a load?

A. I have seen that too.

Q. That is a thing that may happen in any yard, is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that the men of experience moving trucks guard against, is it not?

MR. PLUMMER: That is objected to as not cross examination, if Your Honor please.

THE COURT: Sustained. I think perhaps it is cross examination, but I think it is a conclusion that the jury can draw just as well as this witness.

MR. NELSON: I think it is, in a way, except that I think it is a fact that could be proven by a man of experience. He has proven himself to be an expert, if Your Honor please, and I think it is up to us to be allowed to prove that that is one of the risks he is assuming.

MR. PLUMMER: That is their defense.

MR. NELSON: But we can prove it by their witness if they put him on.

MR. PLUMMER: We just asked him what occurred there.

THE COURT: You did ask him about the cross pieces.

MR. PLUMMER: Yes, that is right.

THE COURT: What they were for.

MR. PLUMMER: Yes.

THE COURT: I think this is germane so far as cross examination is concerned. I think it is proper cross examination. I think I shall overrule the objection.

(Question read.)

A. Yes, it is the same as any other kind of work; it don't make any difference what it is; they have got to look for something.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, counsel asked you if sometimes lumber didn't fall off from these cars. Now in moving this car of lumber, of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair, before it came to that, and being shoved along as has been described here, what would cause the lumber to fall off, going that distance, under those circumstances?

A. I couldn't tell.

Q. Do you know of anything?

A. No.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. But it will sometimes do it, wont it, Mr. Moe?

A. Certainly it will.

MR. NELSON: That is all.

THE COURT: Anything further with this witness?

MR. PLUMMER: That is all. We rest.

(Mr. Nelson thereupon made a statement to the jury.)

JOE FREITAG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. State your name?

A. Joe Freitag.

Q. Where do you live?

A. 1601 Front.

Q. You work for the Edward Rutledge Timber Company, do you?

A. About one year, yes.

Q. You knew Axel Sundin in his lifetime, did you?

A. I know him.

Q. Did you ever work with him?

A. I worked before in the Rutledge Lumber Company about three weeks on the night shift, before.

Q. Did you work with Mr. Sundin in shoving out

these cars of lumber away from the transfer chain?

A. Yes.

Q. I will ask you whether or not you and he ever had any conversation as to the danger of getting alongside of a load of lumber?

A. Yes.

Q. What did he say to you in that regard?

A. It was in the morning, the first time, on the day shift. I worked with him on the day shift, and we were taking the car out, the first truck, just the first time. I will show you. I go to the side here and push it out, the truck, and Mr. Sundin—from the chain—

Q. Just tell what he said to you.

A. He worked there, and he said, "Joe, come back; on the side is too dangerous."

Q. You were at the side of the truck of lumber, were you?

A. I stand there.

Q. You were partly at the side of the truck?

A. Yes.

Q. And Mr. Sundin said, "Joe, get away; it is too dangerous?"

A. Go back—

MR. PLUMMER: We object to that as leading.

THE COURT: He said, "Joe, go back; it is dangerous?"

MR. NELSON: Q. He said, "Joe, go back; it is dangerous?"

A. Yes.

Q. State whether or not, shortly after that, any other person in Mr. Sundin's presence warned you about the danger of working alongside of a truck of lumber? Answer that yes or no.

A. A short while after come Mr. Moe, after the warning come Mr. Moe out there and Moe crossed to me, and he said, he tell me, "Freitag, don't push the truck from the side; it is too dangerous." He give me that advice.

THE COURT: Was this in the presence of—

MR. NELSON: Q. Sundin was there, was he not?

A. Yes.

MR. PLUMMER: We object to that as leading.

MR. NELSON: If Your Honor please, I based my question, in the presence of Sundin.

THE COURT: Was Mr. Sundin there when Mr. Moe said that or not?

A. Yes. Mr. Sundin, first, he warned me.

THE COURT: Yes, but when Mr. Moe said that to you where was Mr. Sundin?

A. Behind this truck.

MR. NELSON: Q. State how many men, Joe, you have worked with behind one of those trucks of lumber.

A. Four men.

Q. Did four men get back of the truck and push?

A. Yes.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. Were you one of the four men that got behind the truck and pushed?

A. Yes.

Q. How many times?

A. There is lots of difference. The same truck is very hard to push.

Q. Do you know what track this accident happened on?

A. Yes.

Q. Can you tell it by number? Has it any particular name, this track that Sundin was hurt on?

A. Not that.

Q. Did you ever push any cars on that track?

A. Oh yes.

Q. How long before Sundin was killed?

A. About two weeks.

Q. About two weeks?

A. Yes.

Q. Were you working with Sundin then?

A. Not at that time.

Q. Where was Sundin then?

A. Sundin was working in the transfer chain, and I worked day time,—I worked in the yard outside.

Q. You didn't belong to the gang though, did you?

A. No.

Q. Did you ever see four men pushing on the end of a car on this track that Sundin was killed on?

A. Mostly four men, in my time, mostly four men, the first time.

Q. How wide are you, about?

A. I don't know—two feet.

Q. And you say these other three men that was on the end of the car, were they as wide as you?

A. Oh no, they are different.

Q. About. I mean the average.

MR. NELSON: We admit that they were average men.

MR. PLUMMER: Average sized men?

MR. NELSON: Yes, average sized men.

MR. PLUMMER: That would be eight feet of men then.

MR. NELSON: Oh, no, it wouldn't be.

THE COURT: Now you have an illustration. Take one of these tables the width of a car.

WITNESS: You push the truck from the side, and not this side. Every man take it this way, and make it four men (illustrating).

MR. PLUMMER: Q. Wouldn't you have to get hold of it like this, to get it started first away from the station, brace like that (illustrating)? Isn't that the way they usually did?

A. Mostly on the side, this way (illustrating).

Q. Did you ever push on the end of a car there when Sundin was one of the four men?

A. Yes, before, yes, three weeks.

Q. Three weeks before he was killed?

A. Long before.

Q. And you say you helped push when he was one of the four men on the end of the car?

A. Sometimes three men, and sometimes four men, and sometimes five men, and sometimes six men, when it was very heavy.

Q. And sometimes eight?

A. Six.

Q. And sometimes seven, you think?

A. They don't have no chance—

Q. You say sometimes four, sometimes five, and sometimes six. Now I am asking you, do you say sometimes seven men?

A. Yes, maybe.

Q. And sometimes eight, sometimes eight men you think?

MR. NELSON: Doing what? I think, if the Court please, he is attempting to confuse the witness.

THE COURT: Doing what?

MR. PLUMMER: I am referring now to the men on the end of the car.

Q. Did you sometimes see four, five, six, and seven men on the end of the car?

A. Yes, sometimes at the end, yes.

Q. And sometimes eight?

THE COURT: If the spectators can't keep quiet they will have to go out of the room.

MR. PLUMMER: Q. Would you see sometimes eight men on the end of the car pushing also, as many as eight?

A. I don't know.

Q. Well, all that Moe ever said was, "Don't push on the side of the car when it is dangerous," didn't he?

A. He told me to.

Q. And when it was dangerous, if the load was kind of sidling, or leaned over, or something of that kind, then you wouldn't go along the side, would you?

A. Everybody knows it is not safe.

MR. PLUMMER: We move to strike that out as not responsive to the question.

THE COURT: Yes, it may be stricken.

MR. PLUMMER: Q. You understood from what Moe said to you, not to push from the side when it looked dangerous?

A. Yes.

Q. You understand by that, that if for any reason the load wasn't squared up, if it leaned to one side, it would look dangerous, wouldn't it?

A. Yes.

Q. And you understood what Moe told you, not to go along the side when it looked like that?

THE COURT: If you insist upon that question I shall have to let the other stand, because you are asking him what Mr. Moe intended by that.

MR. PLUMMER: No. I asked him what he understood from that.

THE COURT: How can he understand from that unless—

MR. PLUMMER: Well, being dangerous—

THE COURT: He said it was dangerous.

MR. PLUMMER: Moe testified that he told them

not to push on the side there when it looked dangerous.

THE COURT: But that isn't what this witness testified. He testified that the deceased, that Mr. Moe told him not to push from the side of it because it was dangerous. He didn't say why.

MR. PLUMMER: I just want to ask him what he understood as being a dangerous condition.

THE COURT: If you insist on that question I shall have to permit the other answer to go in. I am simply advising you of that.

MR. PLUMMER: I don't want to open the door and let him state a conclusion.

THE COURT: Both of them are conclusions.

MR. PLUMMER: All right.

Q. When you say that Sundin told you not to push on the side, where was Sundin then?

A. Where was he?

Q. When he told you that.

A. Close to me.

Q. And where were you?

A. Outside.

Q. Down here?

A. Oh, no, right here. I took it here from the corner and push, and he said, "Joe, go away; outside is dangerous."

Q. At that time there were other loads on either side of this load you were pushing, weren't there?

A. Just this morning, I started. He come in the morning about the first track we push it out.

Q. You mean that was the first morning you went to work?

A. No, this day the first time.

Q. When was this, how long before he was killed?

A. One week before.

Q. One week before?

A. The Thursday before, and the new week on Monday he got hurt.

Q. Now, so as to get it in the record: At the time he warned you not to push the car from where you was then pushing it, you then had hold of the near right-hand corner of the car with your left hand and the side of the car with your right, your body facing the car, and was attempting to exert strength forward in that position?

THE COURT: Yes, that is what he stated. The record may show that.

MR. PLUMMER: Q. At that time there were other tracks alongside of the track that you and he were on that morning, wasn't there?

A. No, just once.

Q. I say there were other tracks, cars, loads?

A. Yes.

Q. And there was a load on one side and also a load on the other.

A. No. This was this morning. In the morning it is open.

Q. Where did the lumber come from that you was going to shove out that morning?

A. The mill.

Q. Wasn't there any lumber going to be put on to the cars?

A. Yes.

Q. Where were the other cars the lumber was on besides the one you was moving?

A. The four tracks, from the chain over the platform to the next track.

Q. Was that the time when you was using a cable to pull them out with?

A. Yes.

Q. And the cable was run by power, wasn't it? Was that the kind of a cable that is on that car there now, Plaintiffs' Exhibit 1, that was used to haul the cars out then?

A. Yes, just here in the corner.

Q. Well, what power was used to pull those cars out that you and he was working on that morning that he gave you this warning?

A. Sometimes with the hand and sometimes with a chain.

Q. This particular car, though, I speak of, the one you had hold of like this, when he told you not to do that. What was pulling that car out?

A. A high truck with lumber.

Q. What was pulling it out? Was they using that cable then?

THE COURT: Were you pushing it or was it being pulled by a cable?

A. No. We push it out, I remember.

Q. I will show you a picture here, showing some

cars of lumber. Were those the kind of cars of lumber you were pushing?

A. Yes, on the short track.

Q. When he was telling you to be careful and come back out of the way?

A. Yes.

Q. And there were other cars of lumber like shown in this picture on each side of the one you and he was shoving, wasn't there?

THE COURT: Can't you get at it by taking a book? The witness speaks English so poorly, can't you illustrate by taking a book to illustrate the car he was pushing, and try to get at it in that way?

MR. PLUMMER: Yes, I will try and do that, Your Honor.

Q. Now here is the car of lumber that you and Sundin was pushing out when he told you to come back out of danger.

A. Yes.

Q. Now, there was a car here, wasn't there?

A. Yes, only one track.

Q. Only one track there?

A. Yes.

Q. Well, you wasn't moving it out then—

A. Just one track.

Q. Just one track?

A. Yes.

Q. That wasn't the place where he got hurt?

A. I worked with him on the short track, moving with him on the platform, and where that other party take it on the big platform.

THE COURT: Where did they take it?

A. They take it and put it out in the lumber yard.

MR. PLUMMER: Q. It wasn't this track he got killed on?

A. Oh, no.

Q. How far away from that track was the one you were working on?

A. This was on Thursday.

Q. How far away was the track that you and he was working on when he told you to come back that from the track that he got killed on?

THE COURT: Do you know where Sundin was killed?

A. No, I don't know. I wasn't there.

THE COURT: Do you know where it is?

A. Yes, I know the place.

THE COURT: How far is that place away from the place where he told you it was dangerous?

A. Just about the same place.

MR. PLUMMER: Q. You say there is only one track there.

A. I don't know. Just the same place he got hurt, Mr. Sundin. I don't know this place. It is not far, the place is not far. The place aint any bigger than this room here.

Q. You say this place where you and he were working at the time he warned you to come out of danger, there was only one track there?

A. Yes, one track, yes, sir.

Q. You are working for them yet, aren't you, the same company?

A. Yes.

Q. And have been working for them ever since?

A. Yes.

Q. What work do you do now?

A. I work in the garden; I make lawn and garden.

Q. For the company?

A. Yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. Joe, where were you and Sundin when Sundin told you to keep away from the side of the car?

A. Right here, about this track here, right here.

MR. PLUMMER: Just mark that.

MR. NELSON: I mark this with a pencil, about here, was it, Joe, just about where it was?

A. The southwest side in the middle.

Q. In the middle southwest of the short tracks?

A. Yes.

Q. It was on one of the long tracks, was it?

A. No, no short track.

Q. It was on a short track?

A. Yes.

Q. You mark it, Joe. There is the south side. You mark just about where you and Sundin were when that happened.

A. Right here, in here.

Q. Make a mark there, Joe.

A. Right here. The track is a little too far.

MR. NELSON: Now, Mr. Plummer, this is where he worked, isn't it?

MR. PLUMMER: Yes.

WITNESS: About the third track on the platform, the third rail, about.

THE COURT: Now the place noted by the witness on this photograph is where you have marked X on Plaintiffs' Exhibit 1?

MR. PLUMMER: Yes, right over the spindle on the flat car.

THE COURT: All right. Go ahead.

MR. NELSON: Q. Joe, supposing that table were a truck of lumber, show how the men would push on it, if there were five or six or seven men around there helping to push it. Just get up there and show how the men would push on it.

A. It is lots different in track. Some track we get very close to the axle. Mostly we make it this way, and maybe some men, they just with their hand.

MR. NELSON: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. When Sundin told you to come away, warned you about the danger, and this track you have marked on Plaintiffs' Exhibit 1, was these other tracks there then, as shown in that picture?

A. Yes, this here; here is the short side, about here.

Q. Those other tracks was there just like that picture shows there?

A. Yes, the four tracks—

THE COURT: Just answer the question.

Q. Those tracks were there just like shown in that picture?

A. Yes, sir.

Q. And the loads were sticking out same as there?

A. Yes, from here. Here is mostly short lumber.

Q. But there were trucks of lumber on either side of the car you and he were working on?

A. Yes.

THE COURT: Now, that we may understand, when you were pushing that car of lumber, when Mr. Sundin told you it was dangerous, was there any other car near the car you were pushing on or not?

A. It was first in the early hours in the morning, and it was open.

THE COURT: Then the car that you were pushing was standing out by itself, was it, away from the other cars?

A. There was no car over there at the same time.

RE-DIRECT EXAMINATION by
MR. NELSON:

Q. When you were shoving like this on the side, there wasn't any car?

MR. PLUMMER: That is leading, if Your Honor please.

MR. NELSON: Then I will withdraw the question. I thought I might bring it out a little clearer, but I am satisfied if you are.

THE COURT: Anything further?

MR. NELSON: That is all, Joe.

JOHN SALSBERG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. What are your initials, Mr. Salsberg?

A. John Salsberg.

Q. Where do you live?

A. Coeur d'Alene, Idaho.

Q. State what experience you have had in moving trucks of lumber in a lumber yard.

A. Well, generally, when I am moving a truck I am pushing it from the back.

THE COURT: You mean how long he has worked at it?

MR. NELSON: How long have you worked in and around lumber yards, moving trucks?

A. Oh, about sixteen or eighteen years.

Q. Do you know how the men usually work in and around lumber yards when they are moving those trucks?

A. Yes.

Q. Supposing this table were a truck of lumber, where do the men generally get, to move that truck?

A. They should move it from the end, to be safe.

MR. PLUMMER: We move to strike that out as irresponsible.

THE COURT: Where do they generally stand in moving it?

A. Right on the back of the load.

MR. NELSON: Q. I will ask you whether or not,

Mr. Salsberg, a man of experiecne, from the side of a truck, can tell by a casual glance at that truck whether or not there are cross pieces in the truck of lumber?

MR. PLUMMER: I think I shall object to that as calling for his conclusion, if Your Honor please. The jury are just as good judges of that as the witness is. If he will just describe the situation and the conditions—

THE COURT: Overruled.

(Question read.)

A. When there is cross pieces in the load they can see that all right.

MR. NELSON: Q. He can see if there are cross pieces in the load?

A. Yes.

Q. I will ask you, Mr. Salsberg, in your opinion, whether or not a reasonably prudent man of experience in moving trucks of lumber would go along the side of a truck of lumber composed of six inch white pine an inch thick, and sixteen feet long, and piled from fifty-four to fifty-five tiers high, at least from fifty to sixty tiers high, when there are no cross pieces in it, and place his back up, get in the middle of the truck, and place his back up against that truck of lumber, and attempt to assist in moving it?

MR. PLUMMER: We object to that as calling for the witness' conclusion, and as not a subject of expert testimony. I would like to be heard on that, Your Honor.

THE COURT: It is unnecessary. The objection is sustained.

MR. NELSON: Q. Did you know Mr. Sundin?

A. No, sir.

Q. How many men have you seen work behind a truck of lumber such as I have described, in moving it?

A. Well, I should think about four men, two on each corner and two in the middle of the load; about four men could get around it.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. Did you work in this mill down here?

A. Yes, sir.

Q. Working there yet?

A. Yes.

Q. What position do you hold?

A. I have got the contract on that.

Q. You have got a contract to cut lumber?

A. Yes.

Q. From the Rutledge people?

A. Yes.

Q. This lumber, as it is sawed, it comes right out of the water doesn't it?

A. Yes.

Q. Green lumber?

A. Yes.

Q. And sawed green?

A. Yes.

Q. And it is piled right on those cars, one right on top of the other?

A. Yes.

Q. Now, how thick is a lath?

A. About a half inch.

Q. Half an inch. Are you sure about that, that a lath is half an inch thick?

A. Probably not—

Q. A quarter of an inch?

A. Probably a quarter of an inch.

Q. You say there is a lath laid across there, some of them diagonally, and some of them even, square across, and unless they happened to come out on the outer edge you wouldn't notice them, would you?

A. There is always little openings, you know.

Q. Suppose the lath only comes to within three inches of the outside of the lumber, that lumber green and wet and packed in there tight, it would be a very thin space which would show there, wouldn't it?

A. Yes, but the lath always go outside of the load a little bit.

Q. But I am saying, assuming that they didn't, you then wouldn't see any opening there, would you, in case they didn't?

A. Well, the way we are doing it—

Q. I didn't ask you what you were doing.

A. We could see that.

Q. Well, we will say this is a board, and the lath was put in so that it only comes to about there, we will say, and didn't extend out at all over the edge,

you say then you could see the lath was still in there, on account of the opening the quarter inch lath would make?

A. It would show all right.

Q. As a matter of fact you wouldn't pay any attention to that, would you?

A. I don't know.

Q. What?

A. I couldn't tell.

Q. Suppose, for instance, that there was piles of lumber on cars on both sides of this car we want to shove out—

A. Yes.

Q. And say there is six inches of space between the two, and that there were four men on the end shoving out, and this other man had to take hold of it after it got started out from between the other two piles, he would have to catch it on the fly, wouldn't he, that is, while it was going, if it was still going and he took hold of it at all he would have to take hold of it while it was moving?

MR. NELSON: We will admit that, that is self-evident.

MR. PLUMMER: Q. And as soon as he can get hold of it he is supposed to take hold of it and keep on shoving it out, isn't he?

A. Yes, sir.

Q. Assuming that there was four men on the end—

MR. PLUMMER: Well, I think he put it that way. That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. But he isn't supposed to put his back up against it, is he?

MR. PLUMMER: We object to that as leading, if Your Honor please.

THE COURT: Sustained.

MR. NELSON: Q. State how he is supposed to take hold of it if he does take hold of it at the side.

A. Well, he can take hold of the corner and push; if he is on the side he can take hold of one corner and push?

Q. As the load comes by he can take hold of the corner and help push?

A. Yes.

THE COURT: You mean the front corner or the back corner?

A. The back corner.

MR. NELSON: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Say here is one load on one side, and here is the load that we are moving, in the middle, and here is a load on this side, and there is six inches between these loads, and the track itself is only twenty-two feet long, and the lumber is sixteen feet long, sixteen foot lumber, on this one that we are going to move, sixteen feet long, six inches wide, and an inch thick, now as a matter of fact this end of this pile of lumber would be up over the car that you are going to put it on before you would get away from between

these other two cars, wouldn't it, if it is sixteen feet long?

MR. NELSON: We object to that, unless it is shown that this car on this side was fourteen foot lumber, as shown by the evidence in this case.

MR. PLUMMER: Mr. Hegstrom testified that it was his understanding that it was.

MR. NELSON: Your question assumes that it was sixteen feet.

MR. PLUMMER: Oh, no—sixteen feet, the one that he is shoving. You have got twenty-two feet of track and you have got sixteen feet of lumber here, and you have got to clear fourteen feet. That is thirty feet, isn't it?

THE COURT: What is it you are trying to get at?

MR. PLUMMER: He says that if he is going to work from the side at all he should get hold of this corner here, and I want to show that he couldn't get hold of that until it cleared the other two cars of lumber.

MR. NELSON: That is self-evident.

THE COURT: But he said he was supposed to take hold of the back corner. These witnesses don't seem to understand English very well. I wish you would have him show the jury and myself upon the table down there, assuming that that table is a car, show how they would get hold on the side, and the number of men, give him the number of men and start your car.

MR. PLUMMER: If there were four men on the end—

MR. NELSON: We object to that unless there are three men, it never having been proven that there were four men on this load.

MR. PLUMMER: Three men is correct.

Q. Suppose there are three men on the end here, and for any reason one of the men had to take hold of the car some other place—

THE COURT: I don't think you have the right to assume that. Suppose there are four men now to move that car, have him show us how they take hold. Suppose there were four men to move that car, and you were going to start it, how would the four men start it? Just go down and show the jury.

A. There would be one man on each corner and two in the middle, two men in the center, and there will be one man on each corner.

THE COURT: You take hold the way you would take hold if you are on the corner.

A. Like this. The load is higher up, so you can reach up a little higher.

THE COURT: Would you all stand about the way you are standing there now?

A. Yes, sir.

MR. PLUMMER: Now, of course, you understand, if Your Honor please, that we have a different theory about the necessity of four men standing there.

THE COURT: You may ask him about that theory.

MR. PLUMMER: If for any reason there wasn't room there for this fourth man, where would he take hold of the car?

THE COURT: That is assuming a condition you will have to show first.

MR. PLUMMER: I have shown it in my case. Both men testified that there wasn't room for any more men there.

THE COURT: But that is a conclusion. Your men testified about the width of this car, and about how far the tracks were apart, and, as you stated a while ago, six or eight inches, or whatever it was, between the loaded cars. Now you have those physical conditions there. Now as to whether there is room for three or ten men there is a conclusion. It is true you had your witnesses so testify, but it is for the jury to conclude whether that is true or not.

MR. PLUMMER: But I wanted him to show, in case there wasn't room for four men there, where would the fourth man stand, if he couldn't get there, is what I want to get at.

THE COURT: Of course he would have to stand on the side.

MR. PLUMMER: They claim he didn't have any right to be on the side at all.

THE COURT: You may ask him the direct question whether a man had a right to stand on the side.

MR. PLUMMER: No, I don't want to do that. I don't want to have to be bound by their witness. This is the question, Mr. Witness:

Q. If there wasn't any more room here for the fourth man, where would he take hold of the car?

MR. NELSON: We object to that as assuming something not proven, and calling for the conclusion of the witness.

THE COURT: I think the answer to that will be obvious, that if they needed four men and they couldn't stand at either end, they would have to stand at the side.

MR. PLUMMER: Unless they could pull it from the front end, and I don't suppose that would be considered. That is all.

MR. NELSON: That is all.

GEORGE STILLWELL, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. What is your first name, Mr. Stillwell?

A. George.

Q. Where do you live?

A. Coeur d'Alene.

Q. For whom do you work?

A. The Edward Rutledge Timber Company.

Q. How much experience, that is, how long have you worked in handling trucks of lumber similar to the ones they use at the Rutledge Timber Company?

A. Between six and seven years.

Q. I will ask you if, in moving one of those trucks of lumber on the transfer platform, where the men usually stand in moving it?

A. At the end.

THE COURT: At the front end or the rear end?

A. The rear end.

MR. NELSON: Q. I will ask you, Mr. Stillwell, whether or not a man at the side of one of those trucks of lumber can tell from a casual observation of it whether or not there are cross pieces in it?

A. Yes, sir.

MR. PLUMMER: We object to that as calling for his conclusion, if Your Honor please.

THE COURT: Overruled.

MR. NELSON: Q. Well, I will ask you, Mr. Stillwell, whether or not it would be reasonably prudent for a man of experience to get alongside of a truck of lumber, white pine, one by six inches, sixteen feet long, and fifty tiers high, and help move it with his back up against that load of lumber?

MR. PLUMMER: We object to that as calling for his conclusion, and not a subject of expert testimony.

THE COURT: Sustained.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You say they usually stand on the end when they pull a car out?

A. Yes, sir.

Q. You have seen them stand on the side, haven't you?

A. Not very much.

Q. But you have some?

A. Yes.

Q. You have seen Mr. Moe, himself, work that way, haven't you, the superintendent?

A. No, sir.

Q. You have never seen him?

A. No.

Q. You are still working out there, aren't you?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all. Mr. Al Johnson.

AL JOHNSON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Mr. Johnson, you work for the defendant, Edward Rutledge Timber Company?

A. Yes, sir.

Q. Where do you live, Mr. Johnson?

A. Coeur d'Alene.

Q. Mr. Johnson, I will ask you whether or not you ever heard any conversation between Mr. Moe and Mr. Sundin in reference to working at the side of a truck of lumber? Yes or no.

A. Yes.

Q. Just tell where that was, and when it was, and what was said by Mr. Moe.

THE COURT: Where was it?

A. It was right on the transfer, that is, from the transfer chain there.

THE COURT: About how long before Mr. Sundin's death?

A. I couldn't say,—probably about a week or ten days.

MR. NELSON: Q. What was said by Mr. Moe at that time?

A. He spoke as a whole to all of them, of course. He didn't speak right to Mr. Sundin, but he spoke to the transfer men at the time.

Q. Was Mr. Sundin in the gang?

A. Yes, Mr. Sundin was in the gang. He says, "Boys, I don't like to have you stop alongside of a load," he says, "when you see it is dangerous that way," and he said, "I would rather have you push from behind." He says, "It is no place for a man alongside of a load."

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. He said, "I don't like to have you boys work alongside of a load when it is dangerous?"

A. He says, "Don't stop up alongside of a load when it is dangerous; I want you to push from behind."

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. He said, "I want you to push from behind?"

A. Yes.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

JOHN ANDERSON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Where do you live, John?

A. Coeur d'Alene.

Q. Did you know Axel Sundin?

A. Yes.

Q. When he was alive?

A. Yes.

Q. Did you work with him on the transfer gang?

A. Yes.

Q. You helped shove out those trucks of lumber, did you?

A. Yes.

Q. Where did you usually stand, John, in shoving out those trucks of lumber?

A. Behind.

Q. The week before this accident did you work on the day or night shift?

A. Night.

Q. Did Axel Sundin work with you?

A. Yes.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. That is where you usually stood, at the rear end, you say?

A. Yes.

Q. As a matter of fact, the men stood on the side and also on the end sometimes, didn't they?

A. No, we used to stand behind.

Q. I say some of the other men would stand on the side, wouldn't they?

A. No,—only three on the night shift.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. You three men took out the loads, did you?

A. Yes.

MR. PLUMMER: That is leading and suggestive.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

LEONARD OTTO, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Where do you live, Mr. Otto?

A. Coeur d'Alene.

Q. What is your trade?

A. Different trades, industrial engineering covering them as a whole.

Q. Have you examined the south side of the transfer shed there at the Edward Rutledge Timber Company?

A. Yes, time and again.

Q. You work for the company at the present time, do you not?

A. I do.

Q. Do you know where the west end of the transfer shed is?

A. Yes.

Q. How is the south side of that transfer shed constructed? On what foundation does it rest?

A. Concrete piers.

Q. How far apart?

A. Sixteen feet center to center, and eleven feet the other way.

Q. Sixteen feet apart east and west?

A. East and west.

Q. And eleven feet—

A. North and south.

Q. North and south?

A. Yes.

Q. What size timber is across these cement piers?

A. Ten by twelve.

Q. Ten by twelve?

A. Yes.

Q. What rests upon them?

A. Four by twelve floor joists.

Q. Running north and south?

A. North and south.

Q. How far apart are those?

A. Twenty-four inch centers.

Q. What flooring is on top of those four by twelve floor joists?

A. Three by ten.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. How long have you been working there?

A. A year ago last November.

Q. A year ago last November?

A. Yes.

Q. It was a year last November, and from that on until now?

A. Yes, until the present time.

Q. Have you been in the same kind of work all the time?

A. Practically.

Q. What is your kind of work?

A. Construction work.

Q. Construction work?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

THE COURT: I suppose the picture shows—these tracks are laid upon the floor he speaks of?

A. Yes, sir.

MR. PLUMMER: I don't know whether that shows the particular tracks he speaks of. I will ask him.

THE COURT: If he knows where the accident occurred, ask him—

MR. PLUMMER: Q. The floor you speak about, are those trucks that appear in that picture—

A. That is what those trucks rest on.

Q. How many tracks are there on the south side of that transfer shed?

A. Seventy short tracks.

Q. And how many on the north side of the transfer shed?

A. Seventy-two, I think.

Q. And how many tracks are there on the west end?

A. Ten.

Q. The lumber is sawed in the mill, is it not, Mr. Otto, and is carried up into this transfer shed, and then carried along it by means of an endless chain—

THE COURT: That appears, gentlemen.

A. Yes, sir.

MR. PLUMMER: I wanted the jury just to get a full idea of it.

Q. How far apart are those rails?

A. Twenty-nine inch center, the gauge of the track, and approximately four feet from center to center of tracks.

Q. How long are those trucks or cars?

A. Accurately speaking, seven foot eleven.

Q. How high is the top of this cross beam on which the lumber rests from the top of the rail?

A. It is twenty-four inches from the base of the rail to the top of the truck,—deducting two and a quarter inches from that.

MR. PLUMMER: That is all.

MR. NELSON: Mr. Clerk, may I have the depositions that were taken in this case?

MR. PLUMMER: If Your Honor please, do I understand that in reference to the depositions,—of course notices were served in regular way, but of course we didn't attend the examination, and in that case are we concluded by the answers, or can we make objections?

THE COURT: No. You may make objections.

MR. PLUMMER: Have you got a copy of the deposition?

MR. NELSON: I think I have.

MR. PLUMMER: I would like to follow them as you go along, because I might want to object before it is read.

MR. NELSON: I don't find the copy. I did have a copy.

MR. PLUMMER: Well, I will just watch over your shoulder.

THE COURT: Just read the name of the witness, and then the questions and answers.

MR. NELSON (reading):

"JOHN OLSON, being duly sworn and examined by Mr. Buffington, testified as follows:

Q. State your name, age, and place of residence.

A. John Olson, forty-five year old, and live at Akeley, Minnesota.

Q. State your business now.

A. I am in business with two other men as partners in retail lumber business here in Akeley, Minnesota.

Q. Were you ever connected with the Red River Lumber Company, and, if so, state in what capacity and for what period of time?

A. Prior to January 1st, 1917, I was employed by the Red River Lumber Company for seventeen years, here at Akeley, and during said employment I was employed at different kinds of work, and was a foreman, from about 1909 until January 1st, 1917.

Q. Did you know Axel Sundin in his lifetime,

the husband of Olga Sundin, one of the plaintiffs in this action, and the man who met his death in the State of Idaho by reason of an accident referred to in the pleadings of this case?

A. Yes.

Q. Did Axel Sundin ever live at Akeley, Minnesota, and if so, by whom was he employed, if you know?

A. Axel Sundin, I know lived in Akeley, Minnesota, in 1909 and continuously thereafter, up to the latter part of 1913, and during this period he was employed by the Red River Lumber Company here at Akeley.

Q. State if you know when Axel Sundin commenced work and how long he worked for the Red River Lumber Company, and the character of such work, and further how well you knew him?

A. I was well acquainted with Axel Sundin, and knew the kind of work he was doing here. Sundin commenced work for the Red River Lumber Company in 1909, when he was employed in the green lumber department, taking lumber from the sorting shed chain and piling same on lumber trucks, and was so employed for three weeks. In October, 1909, he worked in the dry lumber department, and worked continuously in the dry lumber department until 1913.

Q. During the time you mention, from October, 1909, until October, 1913, state with more particularity what Axel Sundin did during this period.

A. October to December, 1909, he worked in the

dry shed. His duties consisted of taking of lumber from trucks run on track, helping grader assort same, and reloading on trucks for shipping. December 1st, 1909, to May 21st, 1911, he worked in our shipping department, loading cars in which his work consisted of taking lumber from trucks on tracks and loading into freight cars. June 1st, 1909, to October 11th, 1913, he worked as grader in flooring alley. In this department he was required to unload flooring from trucks run on tracks, grade the same and reload on trucks for shipment.

Q. To sum up the general character of Sundin's work, state what he did during this period of employment.

A. During all the time he was in the employ of the Red River Lumber Company, his work was in connection with lumber trucks, and in fact his daily work consisted in loading, unloading and handling lumber, and in moving and switching lumber trucks running on narrow gauge tracks.

Q. How was your lumber handled?

A. All of our lumber was handled on the narrow gauge track system, both from our sawmill, dry lumber, dressed lumber and shipping department.

Q. Most of the time that Sundin worked here, was his work under your supervision as foreman?

A. Yes.

Q. Did you have opportunity to observe Sundin's work, and if so, further state your observation as to Sundin's knowledge of his work?

A. Yes. Sundin knew his work. He had long

experience at this work, and I considered him a competent man. He certainly understood the work.

Q. Did he ever meet with an accident here?

A. Not to my knowledge?

Q. Did you as foreman instruct the men, including Sundin, as to any dangers in connection with this kind of work, and, if so, state the general character of instruction given?

MR. PLUMMER: I think, if Your Honor please, that any instructions given in Minnesota four or five years ago about how work should have been done there is wholly immaterial as to how work should have been done here.

MR. NELSON: If Your Honor please, it appears that it was the same kind of system, with narrow gauge tracks and trucks.

MR. PLUMMER: The only thing that appears to be the same is the narrow gauge tracks. As to whether or not he got instructions is wholly immaterial.

THE COURT: If the instructions relate to a matter of this kind I will let them go in. If they are on some other subject they are wholly immaterial and irrelevant.

MR. NELSON: Your Honor would better read the answer and then you can tell. (Handing paper to Court.)

THE COURT: Well, that might or might not relate to a matter of this kind. The objection is sustained. That is, the instructions were neutral so far as this particular matter is concerned.

MR. NELSON (reading):

"Q. Could one doing the work of Sundin tell by mere observation whether there were cross pieces between the lumber piled on the trucks, or not?"

MR. PLUMMER: We object to that as simply calling for a conclusion as to a fact existing three or four years ago, back in Minnesota.

THE COURT: Sustained.

MR. NELSON (reading): "Q. Was Sundin thoroughly familiar while in the employ of the lumber company here with the loading and unloading of lumber on trucks, with pushing and moving of trucks containing piled lumber, including knowledge of danger incident to handling the same?"

A. Yes. My observation is based upon watching him work—

MR. PLUMMER: He has answered the question, and I think the balance of his answer as to observation should be stricken out.

THE COURT: No, I think not.

MR. NELSON (reading): "My observation is based upon watching him work, seeing the results of it, that Sundin knew all about his work, and unquestionably, even at a glance, could tell as well as any man could whether lumber was properly piled on a truck or not."

MR. PLUMMER: The Court can see from the latter part of the answer there—

THE COURT: The latter part may be stricken out. The jury will not consider it.

MR. NELSON (reading): "Q. I understand, Mr.

Olson, that you are not now in the employ of the Red River Lumber Company.

A. No, I am in business for myself.

Q. Have you any interests whatsoever in the outcome of this law suit?

A. No."

MR. PLUMMER: Can't we agree that the next two depositions are the same?

MR. NELSON: Yes, they may be considered read in evidence. They are practically the same.

THE COURT: You may do as you please, either read them or not.

MR. PLUMMER: It is just repetition of two other men, who say the same thing he does.

MR. NELSON: I am perfectly willing to agree that two other men testified to practically the same facts, and that these depositions may be considered read in the record.

THE COURT: Very well.

MR. PLUMMER: That is, the depositions that would testify to the same facts as the one you have read, because I don't want the whole thing to go in.

MR. NELSON: If Your Honor please, as I understand the ruling of the Court, Your Honor would hold that is is a conclusion of the witness to testify as to whether or not a reasonably prudent man with experience would go alongside of a load of lumber in the position the deceased took?

THE COURT: Yes, I think that is a question for the jury, in the light of all the circumstances, rather than for expert testimony.

MR. NELSON: The defendant rests then.

MR. PLUMMER: We rest.

THE COURT: Gentlemen of the jury, you may be excused until two o'clock, and remember the admonition of the court heretofore given you. Keep yourselves free from outside influences. Two o'clock.

(The jury thereupon retired from the court room, whereupon the following proceedings were had, to-wit:)

MR. NELSON: At this time, if Your Honor please, I desire to file a motion for a directed verdict, and haven't set forth in my motion upon what grounds, but upon the ground especially that the uncontradicted evidence on the part of the plaintiff shows that if there was negligence on the part of anyone in this case it was upon the part of a fellow servant of the deceased Axel Sundin, and that the plaintiff assumed the risk of the injury that resulted in his death, and that he was guilty of contributory negligence which was the proximate cause of his death.

(Argument upon motion by respective counsel.)

An adjournment was taken until 1:30 p. m.

1:30 p. m., Monday, June 4, 1917.

THE COURT: Gentlemen of the jury, in the view I have taken of the law of this case, I feel impelled to instruct you to find a verdict for the defendant. As a rule, in giving such an instruction, I briefly explain to the jurors why it is done, in order that they may not feel that the court acts arbitrarily. Of course, in all cases of this character, or nearly

all of them, the condition of the plaintiff makes a strong appeal to the sympathy of all people, but, as courts, we must enforce the law as we see it. The theory upon which the plaintiff, upon behalf of herself and her children, has sought recovery in this case is that the defendant company, by whom the deceased was employed, was negligent, in that it didn't pile this particular load of lumber upon the truck in question in the usual way, with cross ties to keep one or more of the tiers of lumber from toppling over and falling to the floor, and further that the tracks connecting with the larger car, which was used to haul the trucks to the place where the lumber was being piled, were not upon the same level with the tracks upon the general floor. Now you gentlemen will doubtless find that somebody was negligent in the matter of piling this lumber upon the truck. From the evidence that would be a very natural conclusion. But that negligence, such as it was, was on the part of others employed in the same department, in the same general line of service with the deceased, and they were what in law we call fellow servants, that is, fellow workmen, and for the negligence of one's fellow servants the employer is not responsible. A rough illustration would be, where you as a farmer, employed two men to go out, and harvest your hay, and one of them, who was loading the hay, loaded it very carelessly, in such a way that the load toppled over and it fell upon the man below pitching the hay on the load, you, as employer, would not be responsible, because you could not anticipate that the

man loading the hay was going to be negligent. So in this case the men who loaded this lumber upon the particular truck were the fellow servants of the deceased, and, unfortunate though the accident may have been, the defendant company could not be held responsible for the careless act of these other employees.

The other negligence referred to, as I have already stated, is that the track at this particular point was permitted to get out of order and become a little lower than the other track, some testimony tending to show that it was in the neighborhood of an inch and a half lower. It is alleged in the complaint that the deceased knew of this faulty condition or defective condition of the track, and that he said something to the company, or an officer of the company, about it, at least that he knew of it, but whether that had been alleged or not the evidence would seem to leave no doubt that he did know of it, for as testified to by the several witnesses, when they started to put this truck load of lumber upon the transfer car, it met with this obstacle; they pushed it forward until it reached the track on the car, and it would go no further, and they pulled it back to give it a start, and again tried, and they did this at least twice, and I think some of the testimony shows that they did that three times. And it is further shown that he was at the side of the car, had a hold about the middle of the car or truck, so that even had he not made this allegation in his complaint the inference would be inevitable, unavoidable, that he knew of

the obstruction there, and I can't escape the conclusion that it must appear to all that he, with his age and experience, and apparent intelligence, must have been able to appreciate what would be obvious to a child, that rolling this heavy truck against the two projecting ends of the rails would jar the truck,—that must have been appreciated by him,—and that the jar would tend to dislodge the lumber, that is, it would give a shock to the lumber, and if any of it was loose it might fall off,—not that it would, but it might, so that, as an intelligent man, he was bound to take cognizance, knowing of the obstacle there, the projection over which the wheels had to roll, it was incumbent upon him to take knowledge that there would be some danger, and to protect himself against the danger. That isn't necessarily saying that he knew that this lumber was not properly bound by the cross ties. I do not make any such suggestion as that at all. But he was able to appreciate the fact that rolling this heavy truck load of lumber against the projecting ends of the rails upon the transfer car would give the truck a shock which would tend to dislodge the load being carried upon the truck.

You may go to your room, and I will send in a form of verdict. You may elect a foreman, and I will send in a form of verdict, which your foreman will sign. The verdict will be in favor of the defendant. You will understand that you take no responsibility at all in a matter of this kind, and the entire responsibility is upon me for this verdict.

You may swear the bailiff, Mr. Clerk.

(Bailiff sworn.)

THE COURT: Mr. Clerk, you may prepare the form of verdict, and let it recite that it is upon my instruction. You may retire, gentlemen.

The plaintiffs may have an exception.

(The jury retired from the court room.)

MR. PLUMMER: If Your Honor please, I don't know what the practice has been here. What bond would be satisfactory?

THE COURT: A bond of two or three hundred dollars.

MR. PLUMMER: Would two hundred be enough?

MR. NELSON: I think two hundred would.

THE COURT: It is just a bond for costs.

MR. NELSON: Two hundred would be sufficient.

THE COURT: Two hundred dollars. Do you want any time in which to prepare a bill of exceptions?

MR. PLUMMER: I would like to have sixty days, Your Honor. I think I will prepare it in a shorter time than that, but I would like to have that much time.

THE COURT: You may have sixty days.

MR. NELSON: How long may we have then?

THE COURT: You don't need any bill of exceptions.

MR. NELSON: To suggest amendments.

THE COURT: The rules provide for that, and that will be sufficient time for you probably. I think it is ten days. If you need any additional time,—

I think the rules give you sufficient time, and would give the plaintiffs sufficient time if they had the testimony, but it will take some time to get the testimony out. If you feel that you need more time, it can probably be arranged.

(The jury returned into court.)

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 672.

Olga Sundin, and Marguarette Sundin, Iver Sundin,
and Eugene Sundin, minors, by Olga Sundin, their
guardian ad litem,

Plaintiffs,

vs.

Edward Rutledge Timber Company, a corporation,
Defendant.

VERDICT.

We, the jury in the above entitled cause, upon instructions of the court, find for the defendant.

ROBERT T. HORN, Foreman.

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this date, the above cause coming on for hearing upon the application of plaintiffs to settle the bill of exceptions in said cause, and it appearing to the court that the plaintiffs' proposed bill of exceptions was duly served upon the attorney for defendant within the time provided by law, and that no amendments have been suggested thereto by the

defendant, excepting as now incorporated therein, and the court having duly allowed said Bill of Exceptions, and the amendments thereto;

The Court does hereby Order and Certify that said bill of exceptions contains all of the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, including the exhibits offered and admitted in evidence in said cause, which exhibits are hereby made a part of this bill of exceptions and the Clerk of this court is hereby ordered to transmit such exhibits with this bill of exceptions to the Clerk of the United States Circuit Court of Appeals, for the 9th Circuit, holding terms at San Francisco, California, should a Writ of Error be taken out in this cause; that said bill of exceptions is a true bill of exceptions and the same is hereby settled as a true bill of exceptions in this cause, and the same is hereby certified accordingly by the undersigned, Judge of the above entitled court, who presided at the trial of said cause; that it conforms to the truth, and the Clerk of this court is hereby ordered to file the same as a record in said cause.

Dated at Boise, Idaho, this 14th day of August, 1917.

FRANK S. DIETRICH,
District Judge.

Lodged June 29, 1917.

Filed August 14, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR.

Plaintiffs in the above entitled cause, feeling themselves aggrieved by the rulings of the Court, and the judgment entered in this cause, complain in the record and proceedings had in said cause, and also of the rendition of the judgment in the above entitled cause in said United States District Court against said plaintiffs, that manifest error hath happened to the great damage of said plaintiffs, petition said court for an order allowing the said plaintiffs to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and that the giving of the bond by plaintiffs, heretofore fixed by the court in the sum of \$200.00, as provided by law, all further proceedings of this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated this 16th day of August, A. D. 1917.

PLUMMER & LAVIN,

Spokane, Washington.

BLACK & WERNETTE,

Coeur d'Alene, Idaho.

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the above named plaintiffs, and file, serve, and submit their assignment of errors, claimed to be committed by the Court, against plaintiffs in the above entitled action, that is to say:

(1) The Court erred in granting defendant's motion for a directed verdict, at the close of all of the evidence.

(2) The Court erred in directing the jury to render a verdict against plaintiffs, and in favor of defendant.

(3) The Court erred in rendering judgment upon said verdict.

(4) The Court erred in refusing to permit plaintiffs to show by the evidence in the trial of said cause, that the deceased Sundin was required to work very rapidly, and in a rushing and hurried manner, at the time of his injury, resulting in his death, which, if true, would have been a circumstance to have been considered by the jury, in determining whether or not he, Sundin, ought to have, or did, observe and be advised of the absence of cross-pieces or binders through and within the load which collapsed, causing his death.

(5) That the Court erred in permitting defendant, on cross examination of plaintiffs' witness Andrew Moe, to permit and require said Moe to testify to the effect "That a man of ordinary experience in handling lumber on trucks, can tell by casual observation, whether or not there are cross-pieces in the load," and also, "That an ordinary man, who had had

experience in loading lumber and shoving these trucks, for a month or six weeks, could tell by a casual examination of it, from the side of it, that there were, or were not, cross-pieces, or binders in a load.

Plaintiffs claim that the admission of said testimony was not cross-examination, and secondly, that it was simply calling for the personal conclusion of the witness, and not a subject of expert testimony, but the jury would have a right to consider all of the circumstances incident to the work, as the same was being carried on, in order to arrive at a just conclusion of whether or not Sundin ought to have noticed the absence of cross-pieces through the load.

(6) The Court erred in making the statement in the presence of the jury as follows:

“RE-CROSS EXAMINATION by
MR. NELSON:

Q. Mr. Moe, do you know whether or not it is customary for a man to place his back up against a load fifty tiers high, in which there were no cross-pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman?

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Therefore it wouldn't be proper cross-examination.

THE COURT: No, it isn't shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He

also stated that they weren't supposed to do it."

(7) The Court erred in sustaining defendant's objection to questions asked of witness Brewsted by plaintiffs' counsel, as follows:

"Q. Tell him to show the jury how the men usually took hold of it when they took hold of the side of the car at all.

A. This way (indicating).

Q. How long did that custom exist there?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, and not pleaded, and the defense has had no opportunity to meet it.

THE COURT: Sustained. He need not answer."

(8) The Court erred in excluding the proposed testimony offered by plaintiffs' counsel when they attempted to show by witness Brewsted, how much the track had sunk between Saturday and Monday morning, at the time of the accident.

(9) The Court erred in refusing to permit plaintiffs to show the fact that the rails of these short tracks were usually and ordinarily kept and maintained on a level with the track, located upon the transfer car, and also the refusal of the court of plaintiffs' offer of proof, which offer was as follows:

"MR. PLUMMER: Plaintiffs offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employees were attempting to place the loaded car of lumber."

Dated at Spokane, Washington, this 16th day of August, A. D. 1917.

PLUMMER & LAVIN,
Spokane, Washington,
and BLACK & WERNETTE,
Coeur d'Alene, Idaho.
Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING WRIT OF ERROR.

Upon petition of plaintiffs, through their attorneys of record,

It Is Ordered, that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be the amount heretofore fixed by the court, to-wit: the sum of \$200.00 which said bond may be executed by said plaintiffs as principals, through their attorneys herein, and by such surety or sureties as shall be approved by the court, and which when executed shall operate to suspend any further action on said judgment by this court, pending the determination of such writ of error.

Dated this 18th day of August, A. D. 1917.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON WRIT OF ERROR.

Know All Men By These Presents:

That we, Olga Sundin, on her own behalf, and as Guardian ad Litem for Marguarette Sundin, Iver Sundin, and Eugene Sundin, minor children of said Olga Sundin, as principals, by Plummer & Lavin, their attorneys of record, and National Surety Company, as surety, are held and firmly bound to the Edward Rutledge Timber Company, a corporation, the above named defendant in the full and just sum of \$200.00, well and truly to be paid, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our hands and dated this 16th day of August, A. D. 1917.

Whereas, lately at the May term, A. D. 1917, of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between said principals and said Edward Rutledge Timber Company, a corporation as plaintiffs and defendant respectively, a final judgment was rendered against said plaintiffs and said plaintiffs, having obtained from said court, a Writ of Error, to reverse the judgment in the aforesaid suit, and a citation directed to said defendant is about to be issued, citing and admonishing it to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if said plaintiffs should prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

Olga Sundin,
Marguarette Sundin,
Iver Sundin,
Eugene Sundin,
By Olga Sundin, their guar-
dian,
By Olga Sundin,
Guardian ad Litem,
By Plummer & Lavin,
Black & Wernette,
Attorneys of Record.

Principals.

NATIONAL SURETY COMPANY,
James A. Brown,
Resident Vice President.
S. A. Mitchell,
Resident Assistant Secretary.
Surety.

(Corporate Seal.)

The foregoing bond is hereby approved, this 18th day of August, 1917.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE.

*To the Honorable W. D. McReynolds, Clerk of the
United States District Court, Boise, Idaho.*

The undersigned attorneys of record for plaintiffs in the above entitled action, hereby request that you prepare and have printed, a transcript of the record in the above entitled cause, for presentation to the Circuit Court of Appeals for the Ninth Circuit, for hearing during the October, 1917, term; and that you only include in said transcript, the following papers:

Complaint, Answer, Bill of Exceptions, including photograph, being Exhibit No. 1, Judgment, Order Settling Bill of Exceptions, Assignment of Errors, Petition for Order Allowing Writ of Error, Order Allowing Writ of Error, Writ of Error, Bond on Writ of Error, Citation on Writ of Error, which shall include all endorsements on each of said papers, and which shall include the certificate of the Court settling the Bill of Exceptions.

PLUMMER & LAVIN,

Spokane, Washington.

BLACK & WERNETTE,

Coeur d'Alene, Idaho.

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

OLGA SUNDIN, et al., *Plaintiffs,*

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
corporation, *Defendant.*

WRIT OF ERROR.

*The President of the United States of America, to
the Honorable, the Judge of the District Court
of the United States for the District of Idaho,
Northern Division, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you at the May, 1917, term thereof, between Olga Sundin, and Marguar-ette Sundin, Iver Sundin, and Eugene Sundin, minors, by Olga Sundin, their Guardian ad Litem, as plaintiffs, and the Edward Rutledge Timber Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ of error, so that you have the same at the city of San Francisco, in the State of California, in time for the hearing of said cause in the October, 1917,

term thereof, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 18th day of August, A. D. 1917, of the Independence of the United States the one hundred forty-first year.

W. D. McREYNOLDS,

*Clerk of the District Court for the District
of Idaho, Northern Division.*

(Seal.)

Allowed by:

FRANK S. DIETRICH, *District Judge.*

Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

OLGA SUNDIN, et al., *Plaintiffs,*

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
corporation, *Defendant.*

CITATION ON WRIT OF ERROR.

The President of the United States, to Edward Rutledge Timber Company, a corporation, and to Ralph S. Nelson, its attorney of record, Greeting:
You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Idaho, Northern Division, wherein Olga Sundin, on her own behalf, and as Guardian ad Litem for Marguarette Sundin, Iver Sundin, and Eugene Sundin, minors, are plaintiffs, and the Edward Rutledge Timber Company, a corporation, is defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 18th day of August, 1917, A. D., and the Independence of the United States the one hundred and forty-first.

FRANK S. DIETRICH,
*United States District Judge, for
the District of Idaho.*

(Seal.)

Attest:

W. D. McREYNOLDS, *Clerk.*

Due and legal service of the above citation, acknowledged this 23rd day of August, A. D. 1917.

RALPH S. NELSON,
Attorney for Defendant in Error.

Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal.)

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 162, inclusive, contain true and correct copies of the Complaint, Answer, Judgment, Bill of Exceptions, Order settling Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order allowing Writ of Error, Bond on Writ of Error, Praecipe, Writ of Error, Citation, Return to Writ of Error and Clerk's Certificate, in the above entitled cause, which constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of \$225.65, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 8th day of September, 1917.

W. D. McREYNOLDS,

(Seal.)

Clerk.